Supreme Court, U.S.
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No. 09-____

In the Supreme Court of the United States

PLACER DOME, INC. AND BARRICK GOLD CORPORATION,

Petitioners,

v.

PROVINCIAL GOVERNMENT OF MARINDUQUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Ninth Circuit's reversal of the district court's dismissal on grounds of *forum non conveniens* before deciding jurisdictional issues improperly restrict the discretion granted in *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007), and apply an incorrect standard of review?

2. Does federal question jurisdiction exist based on the federal common law of foreign relations where substantial foreign policy concerns are implicated, though not expressly stated on the face of the complaint? The Second, Fifth, and Eleventh Circuits extend jurisdiction in such cases but the Ninth Circuit applies a more restrictive test that excludes such cases from federal court.

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 14.1(b), petitioner states that all parties appear in the caption of the case on the cover page.

CORPORATE DISCLOSURE STATEMENT

Placer Dome, Inc. ("PDI") PDI is wholly amalgamated into Barrick Gold Corporation. There is no parent or publically held company owning 10% or more of the corporation's stock.

Barrick Gold Corporation. There is no parent or publically held company owning 10% or more of the corporation's stock.

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evade any real responsibility for the damages sustained on Marinduque.

164. As noted above, after the Maguila-Guila Dam collapsed in December 1993, Placer Dome refused to accept any responsibility for the resulting death and destruction. Instead, Steven Reid, the Placer-Dome appointed Resident Manager of the mining operation, claimed that Placer Dome was not legally responsible for the dam collapse because it was caused by "unusual rainfall due to a typhoon."

165. Less than three years later, Placer Dome shifted the blame for the Boac River disaster — claiming that the plug had collapsed due to shock waves from a minor earthquake.

166. Despite continuing to blame heavy rainfall for the burst siltation dam, and the earthquake for the Boac River disaster, Placer Dome eventually acknowledged its duty and commitment to compensate the victims of the disaster and to remediate the Boac River. Or so it seemed. On April 11, 1996, John Willson, Placer Dome's President, wrote to Philippine President Fidel Ramos, stating that:

> The residents of Marinduque who have suffered personal inconvenience or damage to their property as a result of the Marcopper event will be quickly and fairly compensated. In this regard Marcopper has a clear responsibility to repair the damage and pay compensation for the loss caused by the discharge of tailings into the environment. As a major shareholder, Placer Dome is

committed to ensuring that Marcopper will meet all its legal obligations.

167. In reliance on Placer Dome's promises, the Philippine government decided not to pursue more aggressive measures to compensate the victims of the disaster.

168. Placer Dome, however, has never lived up to its promises to the Philippine government, the Province, or the people of Marinduque. Although Placer Dome recently paid in some funds to an Environmental Guarantee Fund to compensate fishermen and other villagers affected by the disaster, thousands of them have yet to be compensated at all. The fund is woefully deficient to compensate for the harm caused by Placer Dome.

169. Placer Dome, moreover, employed only the most half-hearted effort to remediate the Boac River. Specifically, in 1997, it built a dredge tunnel at the mouth of the Boac River hoping that it would catch the mine tailings flowing down the river and prevent them from going out to sea. However, because Placer Dome did not dig the dredge tunnel deep enough, it did not catch all of the tailings and many of them escaped out to the sea where they damaged marine life. Moreover, Placer Dome never attempted to remove the tailings caught by the dredge tunnel. They remained in the river.

170. Shortly after sponsoring this so-called remediation effort, Placer Dome purportedly divested itself of any interest in Marcopper. First, Placer Dome transferred its shares in Marcopper to a company called BC Holdings, Ltd. Next, Placer Dome

sold BC Holdings, Ltd. to Marcopper for a grand total of $1.00. Placer Dome then fled from the Philippines and left its wholly owned subsidiary, Placer Dome Technical Services ("PDTS"), to address the havoc left behind by mine tailings in and around the Mines.

171. But Placer Dome did not address the tailings problem with substance. Instead, it chose "PR," publishing a 34-page comic book entitled "The Marcopper Mine Spill Story," which was filled with cartoon pictures and propaganda regarding the "accidental mine spill."

172. According to Placer Dome's comic book, an "earthquake" caused "mine waste . . . to leak into the river." Although "the fish moved away after the spill," PDTS claimed those fish "will come back again when the river water is clean again." As "the company responsible for cleaning the river," PDTS promised "to rehabilitate the Boac River," which would "be mostly clean by 1998." Like Placer Dome, PDTS never lived up to its promises.

173. In 1997, PDTS applied for a permit from the DENR to dump those mine tailings into the ocean through an underwater pipe. PDTS pushed for this disposal method, known as Submarine Tailings Disposal ("STD"), because it was the cheapest available alternative. But PDTS failed to tell the DENR that STD has long been effectively banned in Canada -- Placer Dome's home country - as well. as in the United States, because it is not considered to be a safe method for disposing of mine tailings.

174. In fact, when Canada experimented with STD in 1971, it found that, after being dumped into

the sea, the tailings dispersed over a very wide area and severely affected marine life in shallow waters. Consequently, the Canadian government banned the use of STD in 1977, and has consistently resisted pressure from the mining industry to reverse that decision since then.

175. Even though PDTS had concealed these problems with STD, the DENR rejected the STD permit application on October 30, 1997. The DENR Secretary, Victor Ramos, noted that, under Philippine laws and regulations, offshore areas "are considered to be Environmentally Critical Areas."

176. In 1998, PDTS sponsored a half-hearted remediation effort of its own. It paid local residents to fill sandbags with the toxic mine tailings, using only their bare hands. PDTS then left those bulging sandbags rotting on the banks of the Boac River.

177. On February 16, 1999, PDTS re-applied for an STD permit. To dispel any opposition to that application, a PDTS representative, Orly Cruz, threatened residents that if they successfully opposed the STD application, PDTS would just "go away and leave the tailings in the river." Once again, the DENR denied the STD application.

178. PDTS eventually followed through on its threat to "go away and leave the tailings in the river," After failing to obtain a permit for its low-cost, high-risk disposal method, PDTS secretly divested its Marcopper shares in November 2001. One month later, just before Christmas, PDTS suddenly closed its offices in Marinduque and Manila, and pulled out of the Philippines. Like Placer Dome, PDTS also

abandoned Marinduque, broke its promises, and left its tailings behind.

c. Placer Dome's Evasion of Civil and Criminal Liability.

179. Since fleeing the Philippines in 1997, Placer Dome has repeatedly evaded efforts to impose civil or criminal liability on Placer Dome for its actions in Marinduque.

180. Placer Dome officials, for example, have stalled criminal proceedings with multiple appeals based on procedural technicalities.

181. In April 1996, the DENR brought criminal charges against two Placer Dome-appointed officers of Marcopper: (a) John Loney, the Placer-Dome appointed President and CEO of Marcopper; and (b) Steven Reid, the Placer-Dome appointed Resident Manager of the mining operation (collectively the "Placer Dome Officials").

182. In the indictment, the DENR alleged that the Placer Dome Officials had violated provisions of the Pollution Control Law, the Revised Penal Code, the Philippine Mining Act of 1995, and the Water Code of the Philippines.

183. With respect to the Pollution Control Law, the DENR alleged that the Placer Dome Officials had violated a prohibition against dumping substances that cause pollution into Philippine waters. In support of this allegation, the DENR's indictment stated that water samples from 16

different locations in the Boac River contained dangerous levels of cadmium, copper, and lead.

184. With respect to the Revised Penal Code, the DENR alleged that the Placer Dome Officials had violated a prohibition against engaging in reckless imprudence resulting in damage to property. In support of this allegation, the DENR's indictment stated that Placer Dome was aware that mine tailings were seeping into the drainage tunnel beneath the Tapian Pit by at least August 1995. According to the indictment, Placer Dome recklessly chose to ignore this problem, which resulted in the massive spill of mine tailings into the Boac River less than one year later.

185. With respect to the Philippine Mine Act of 1995, the DENR alleged that the Placer Dome Officials had violated a prohibition against willfully violating, or grossly neglecting to abide by, an Environmental Compliance Certificate ("ECC"). According to the indictment, the DENR had issued an ECC to Placer Dome requiring that it: (a) dump mine tailings into the Tapian Pit only until an alternative disposal method could be developed and (b) ensure that run-off and silt materials were prevented from reaching the Mogpog and Boac Rivers. The DENR alleged that the Placer Dome Officials willfully violated this ECC by failing to take steps to prevent mine tailings from seeping into the drainage tunnel beneath the Tapian Pit.

186. With respect to the Philippines Water Code, the DENR alleged that the Placer Dome Officials had violated a prohibition against performing acts that result in the introduction of

polluting substances into a source of water supply. In support of this allegation, the DENR charged that Placer Dome's mine tailings had transformed the Boac River into a dead river.

187. Rather than respond to these serious allegations, the Placer Dome Officials, like Placer Dome itself, fled the Philippines. Indeed, both Loney and Reid received promotions to high-level management positions within Placer Dome's corporate headquarters back in Canada. They also filed a motion to quash the indictment, which the trial court denied in part. The Placer Dome Officials then appealed that ruling to the Court of Appeals, which held that all criminal charges against the Placer Dome Officials could proceed to trial in the Philippines. Unwilling to stand trial for their actions, the Placer Dome Officials filed yet another appeal to the Philippine Supreme Court, which is currently considering the matter.

188. Placer Dome has also dodged any and all efforts to impose civil liability for its actions. In 2001, a group of Marinduquenos filed suit against Placer Dome in the Philippines, seeking damages for property destroyed by the collapse of the Maguila-Guila Dam. In 2004, another group of Marinduquenos filed suit against Placer Dome in the Philippines, seeking damages for health problems that Placer Dome caused to individuals living around Calancan Bay. To date, Placer Dome has successfully avoided being served with process in either suit.

189. Placer Dome has also refused to appear at hearings before the Committee on Ecology in the Philippine House of Representatives. Placer Dome,

which had fled the Philippines less than 18 months earlier, did not attend the first such hearing in May 1999, but instead sent PDTS President John Peter Neilans in its place. Speaking for Placer Dome and PDTS, Neilans promised that they would not abandon the people of Marinduque, declaring that "[w]e will not fade away."

190. Despite Neilans' representations to the contrary, Placer Dome and PDTS did fade away. And they also refused to appear at the very next congressional hearing on this issue, on October 9, 2001. On the night before the hearing, the new PDTS President, Ian Lewis, faxed a letter to Congressman Edmundo Reyes, Jr., announcing that PDTS would not attend that hearing.

191. Shortly after that, another fax, from PDTS arrived in the Congressman's office, this one attacking a leaked letter dated August 23, 2001 from Klohn Crippen, a Vancouver-based engineering firm retained by Placer Dome to review its remaining mining structures on Marinduque. That letter, which was addressed to, among others at PDTS, Ian Lewis, urged the immediate remedial action in order to avoid further "loss of life" on Marinduque. PDTS not only declined to take the action, it also refused to explain that decision at the congressional hearing.

192. Less than three months after this hearing, PDTS – like Placer Dome had previously done — suddenly closed its offices in Marinduque and abandoned the Philippines. Both Placer Dome and PDTS have refused to appear at all subsequent congressional hearings, despite the issuance of

congressional subpoenas compelling their attendance at such hearings.

193. Following Placer Dome's no-shows at the congressional hearings, Philippine President Gloria Macapagal-Arroyo even traveled to Canada to meet personally with Canadian Prime Minister Jean Chretien and Placer Dome representatives in late January 2002. During her visit, President Arroyo pleaded for Placer Dome to compensate the people of Marinduque for the extensive damage left behind on the island. Placer Dome, of course, summarily denied President Arroyo's request.

194. In the January 2002 meeting, the Placer Dome representatives maintained that there was no proof that Placer Dome had caused a lasting harm to Marinduque. The Province had struggled for years to raise sufficient funds to pay for an independent study to determine the full extent of the environmental damage caused by Placer Dome. But the Province was never able to raise enough money.

195. Nevertheless, President Arroyo was so infuriated by the conduct of the Placer Dome representatives at the January 2002 meeting that, upon returning to the Philippines, she promised the Province that she would set aside money in the Presidential budget to fund an independent study. These funds were subsequently used to fund the USGS' study of Marinduque.

IV. DAMAGES

A. Environmental Damages.

a. Calancan Bay.

196. As a direct and proximate result of Placer Dome's conduct, Calancan Bay is completely saturated with mine tailings. Heavy metals leach out of these tailings into the water and smothers coral reefs and kills flora, fauna, crustaceans, fish, and the surrounding wildlife dependent on these delicate ecosystems for their survival. Moreover, Placer Dome has dumped such a large volume of tailings into one area of Calancan Bay that it has created a 4.5-mile causeway of toxic tailings that stretches out to sea. This causeway gives off a thick smell of sulphur and it is littered with rusty pipe. When the wind blows, dust-containing tailings is blown from the causeway to nearby farms, where it infiltrates the soil, poisons the crops, and is inhaled by persons and animals in the area.

b. The Mogpog River.

197. As a direct and proximate result of Placer Dome's conduct, the Mogpog River is a "dead river." Aquatic life can no longer be sustained in the river waters. The river is polluted with acid mine drainage and toxic heavy metals. The stream of tailings that seep through the overflow hole in the Maguila-Guila Dam is endless and has not abated since Placer Dome's abandonment of the mine. Moreover, the USGS warns that, if any of the ten or so strong typhoons that hit the Philippines each year were to hit Marinduque and the dam, the dam would most

certainly collapse, cause a devastating flood, and, among other things, release more toxic materials into the river.

c. The Boac River.

198. As a direct and proximate result of Placer Dome's conduct, the Boac River is heavily polluted. Of the over 793 million gallons (U.S.) of toxic mine tailings that spewed from the Tapian Pit in 1996, 30 percent of the tailings still remain in the river. Moreover, thousands of sandbags filled with tailings are decaying along both banks of the river and reentering the river during rainstorms. Aquatic life can no longer be sustained in the river waters. The river is polluted from acid mine drainage and toxic heavy metals. Moreover, the citizens' free use of the bay is now obstructed by the causeway.

B. Economic Damages

a. Loss of Use and Enjoyment of Calancan Bay and Surrounding Areas.

199. Citizens can no longer safely swim and play in Calancan Bay and surrounding areas as a result of Placer Dome's polluting. Moreover, contrary to Placer Dome's assertion that the 4.5-mile causeway of mine tailings in Calancan Bay is a nice "beach" on which Marinduquenos can hold their picnics, the causeway poses a danger to human health because toxic dust is blown around by the wind and because the edges of the causeway, on which Marinduquenos continue to walk and fish, are becoming more and more unstable.

b. Destruction of the Fishing Industry and Lost Income.

200. Calancan Bay was once a fertile fishing ground. However, safely edible marine life is nowhere to be found. The once unobstructed bay is now clogged with a toxic causeway that interferes with navigations, commerce, fishing, and harvesting over and within the bay. As a result, fishermen, who used to fish in Calancan Bay, now have to travel three to four hours to fishing grounds at sea. These fishermen have been unable to catch as many fish in these new fishing grounds as they used to catch in Calancan Bay, even with the greater investment of time and money now required, because there is significantly more competition in these new fishing grounds. For the first time, these Marinduque fishermen are competing for fish with large commercial fishing boats, and they cannot possibly win such a competition. As a result of the foregoing, citizens of the Province have lost and will continue to lose significant income.

c. Destruction of the Tourist Industry.

201. As a direct and proximate result of Placer Dome's environmentally destructive mining activities, what was once a promising tourist industry in the Province no longer exists. The unique beauty of the Province's environment, which drew and would have continued to draw tourists in ever increasing numbers, has been rendered virtually useless for this purpose causing substantial economic losses for the Province and its citizens.

d. Non-User Losses.

202. As a direct and proximate result of Placer Dome's environmentally destructive mining activities, the natural resources of the Province have suffered great losses with respect to their Option, Existence, Bequest and Public Goods values.

C. Human Health Problems

a. Respiratory Problems.

203. Dust associated with mine tailings is blown around "like flour" in Marinduque. As a result, area residents inhale this dust that contains heavy metals. In March 2000, the NCDCS found that the level of lead in the air near the coastline of Botilao exceeded EPA standards and was almost double the level found in another area of Botilao. Residents of Botilao and other areas around Calancan Bay have experienced respiratory problems as a result.

b. Heavy Metal Toxicity.

204. In addition to inhaling toxic dust from dangerous mine tailings, Marinduquenos ingest toxic levels of heavy metals by eating fish from Calancan Bay and drinking water from polluted wells. The amounts for some residents are sometimes described as "sublethal," with the caveat that residents will continue to accumulate heavy metals in their body. Local hospitals report numerous cases of heavy metal blood poisoning. This poisoning can cause skin lesions that lead to bacterial infection, tumors, and amputation. Children born to mothers with heavy metal toxicity are often born mentally retarded.

Sometimes, the treatments for heavy metal toxicity are unavailable or too late, and Marinduquenos die.

D. Medical Monitoring and Care

205. The Province has incurred and will continue to incur substantial expenses for public health programs, including without limitation, medical monitoring, treatment, and care of those citizens exposed to and harmed by the continuing releases of toxic mine tailings into the environment of the Province

E. Necessary Remediation

206. Placer Dome breached the original Calancan Bay dumping permit that required disposal of mine tailings deep beneath the surface of the bay. Now, the bay is completely saturated with mine tailings, and Placer Dome has dumped such a large volume of tailings into one area of Calancan Bay that it has created a 4.5-mile long "beautiful beach" composed of toxic tailings that stretches out to sea. The environmental damage caused by Placer Dome's dumping is unfathomable. Placer Dome should be held to its promise and be forced to remediate and restore Calancan Bay.

207. By polluting Calancan Bay, Placer Dome has destroyed or driven away many species of coral, flora, fauna, crustaceans, and fish. To correct this wrong, Placer Dome should be required to pay for the re-introduction of harmed species after it cleans and restores the bay environment.

208. Placer Dome has also severely polluted the Mogpog and Boac Rivers and, as a result, aquatic life can no longer be sustained in either river. To correct this wrong, Placer Dome should be required to remediate and restore the river environments and to pay for the re-introduction of harmed species into the cleaned environments.

209. Additionally, when Placer Dome fled from the Philippine, it left the Tapian Pit and the San Antonio Pit in conditions that are dangerous to the surrounding environment. Accordingly, Placer Dome should be forced to renovate and rehabilitate both pits to an environmentally safe condition.

V. CAUSES OF ACTION

COUNT I: ENFORCING THE PUBLIC TRUST

210. The Province incorporates by reference the allegations contained above.

211. The Province is a body politic and political subdivision of the Republic of the Philippines. It is endowed with authority to exercise the powers of the Republic of the Philippines in promoting the general welfare; enhancing the right of its citizens to a balanced ecology; preserving the comfort and convenience of its people; and protecting the ecology, environment, and natural resources of its territory and preserving the same for enjoyment by future generations.

212. The Province also shares responsibility with the Republic of the Philippines for protecting the public interest in and enforcing the public trust

over the natural and wildlife resources of its territory, including, without limitation, the shores, beds, and waters of the Mogpog and Boac Rivers, downstream coastal areas, and Calancan Bay; and for ensuring that the Filipino people may enjoy the navigation of their waters, carry commerce over their waters, and have liberty of fishing and harvesting therein free from artificial obstruction or interference.

213. Placer Dome's improper trespasses and releases of acid mine drainage and toxic mine tailings have caused and continue to cause injury to the ecology, environment, and natural resources of the shores, beds and waters of the Mogpog and Boac Rivers, downstream coastal areas, and Calancan Bay. By these and related actions and failures to act, Placer Dome has unlawfully obstructed and interfered with, and continues to obstruct and interfere with, the navigation of the waters and the ability to carry commerce over the waters, including fishing and harvesting therein, and the public's use and enjoyment thereof.

214. The Province is entitled to an award of the maximum amount of damages allowed by law, including, without limitation, damages to the Province's natural resources, and damages for the costs of restoration, to their natural state, of all of the resources held in trust by the Province and harmed by Placer Dome's releases and trespasses, including, without limitation, the costs of restoring the ecology, environment, and natural resources of the shores, beds, and waters of the Mogpog and Boac Rivers and Calancan Bay.

COUNT 2: VIOLATIONS OF THE PHILIPPINE REVISED PENAL CODE (RECKLESS IMPRUDENCE)

215. The Province incorporates by reference the allegations contained above.

216. Pursuant to Article 100 of the Philippine Revised Penal Code, Placer Dome is civilly liable for damages resulting from the commission of any felony offense in connection with operations at the Mines.

217. In regard to Calancan Bay, the following acts and/or omissions by Placer Dome, among others, constituted the felony offense of reckless imprudence, in violation of Article 365 of the Philippine Revised Penal Code:

a. dumping mine tailings at the surface level of Calancan Bay in reckless disregard of the permit requirement that tailings be buried beneath the bay;

b. dumping mine tailings at the surface level of Calancan Bay in reckless disregard of the environmental damage being caused to the bay and the surrounding area; and

c. dumping mine tailings at the surface level of Calancan Bay in reckless disregard of the health problems being suffered by the Marinduquenos as a result of the environmental damage.

218. In regard to the Mogpog River, the following acts and/or omissions by Placer Dome,

among others, constituted the felony offense of reckless imprudence, in violation of Article 365 of the Philippine Revised Penal Code:

a. failing to design the Maguila-Guila Dam to withstand heavy seasonal rainfall and/or typhoons;

b. failing to construct the Maguila-Guila Dam to withstand heavy seasonal rainfall and/or typhoons;

c. failing to rebuild the Maguila-Guila Dam so as to prevent toxic silt from flowing into the Mogpog River; and

d. failing to rebuild the Maguila-Guila Dam properly, and in the manner best calculated to insure the safety of the Marinduquenos downriver.

219. In regard to the Boac River, the following acts and/or omissions by Placer Dome, among others, constituted the felony offense of reckless imprudence, in violation of Article 365 of the Philippine Revised Penal Code:

a. failing to perform an environmental risk assessment of the Tapian Pit before beginning to dump mine tailings into it;

b. failing to construct the original plug in the drainage tunnel so as to prevent mine tailings from seeping into the Boac River through the drainage tunnel;

c. failing to construct the original plug in the drainage tunnel so as to withstand the pressure generated when Placer Dome's engineers drilled into the drainage tunnel to install the second plug;

d. drilling into the drainage tunnel to install the second plug with reckless disregard for the consequences on the original plug and the drainage tunnel, and without regard for the possibility of a plug and tunnel collapse; and

e. failing to repair the plug in the drainage tunnel within a reasonable time.

220. These acts and omissions by Placer Dome, among others, constituted the felony offense of reckless imprudence that proximately caused injury to the Province and the people of Marinduque. As a direct and proximate result of such injury, the Province and the people of Marinduque incurred very substantial damages.

COUNT 3: VIOLATIONS OF THE PHILIPPINE REVISED PENAL CODE (SIMPLE IMPRUDENCE)

221. The Province incorporates by reference the allegations contained above.

222. Pursuant to Article 100 of the Philippine Revised Penal Code, Placer Dome is civilly liable for damages resulting from the commission of any felony offense in connection with operations at the Mines.

223. In regard to Calancan Bay, the following acts and/or omissions by Placer Dome, among others, constituted the felony offense of simple imprudence, in violation of Article 365 of the Philippine Revised Penal Code:

a. dumping mine tailings at the surface level of Calancan Bay in disregard of the permit requirement that tailings be buried beneath the bay;

b. dumping mine tailings at the surface level of Calancan Bay in disregard of the environmental damage being caused to the bay and the surrounding area; and

c. dumping mine tailings at the surface level of Calancan Bay in disregard of the health problems being suffered by the Marinduquenos as a result of the environmental damage.

224. In regard to the Mogpog River, the following acts and/or omissions by Placer Dome, among others, constituted the felony offense of simple imprudence, in violation of Article 365 of the Philippine Revised Penal Code:

a. failing to design the Maguila-Guila Dam to withstand heavy seasonal rainfall and/or typhoons;

b. failing to construct the Maguila-Guila Dam to withstand heavy seasonal rainfall and/or typhoons;

c. failing to rebuild the Maguila-Guila Dam so as to prevent toxic silt from flowing into the Mogpog River; and

d. failing to rebuild the Maguila-Guila Dam properly, and in the manner best calculated to insure the safety of the Marinduquenos downriver.

225. In regard to the Boac River, the following acts and/or omissions by Placer Dome, among others, constituted the felony offense of simple imprudence, in violation of Article 365 of the Philippine Revised Penal Code:

a. failing to perform an environmental risk assessment of the Tapian Pit before beginning to dump mine tailings into it;

b. failing to construct the original plug in the drainage tunnel so as to prevent mine tailings from seeping into the Boac River through the drainage tunnel;

c. failing to construct the original plug in the drainage tunnel so as to withstand the pressure generated when Placer Dome's engineers drilled into the drainage tunnel to install the second plug;

d. drilling into the drainage tunnel to install the second plug with disregard for the consequences on the original plug and the drainage tunnel, and without regard for the possibility of a plug and tunnel collapse; and

e. failing to repair the plug in the drainage tunnel within a reasonable time.

226. These acts and omissions by Placer Dome, among others, constituted the felony offense of simple imprudence that proximately caused injury to the Province and the people of Marinduque. As a direct and proximate result of such injury, the Province and the people of Marinduque incurred very substantial damages.

COUNT 4: VIOLATIONS OF THE WATER CODE OF THE PHILIPPINES

227. The Province incorporates by reference the allegations contained above.

228. Pursuant to Article 100 of the Philippine Revised Penal Code, Placer Dome is civilly liable for damages resulting from the commission of any felony offense in connection with operations at the Mines.

229. In regard to Calancan Bay, the following acts and/or omissions by Placer Dome, among others, constituted the felony offense of dumping tailings from mining operations into rivers and waterways without prior permission, in violation of Article 77 of the Water Code of the Philippines:

a. dumping mine tailings at the surface level of Calancan Bay in disregard of the permit requirement that tailings be buried beneath the bay;

b. dumping mine tailings at the surface level of Calancan Bay in disregard of the

environmental damage being caused to the bay and the surrounding area; and

c. dumping mine tailings at the surface level of Calancan Bay in disregard of the health problems being suffered by the Marinduquenos as a result of the environmental damage.

230. In regard to the Mogpog River, the following acts and/or omissions by Placer Dome, among others, constituted the felony offense of dumping tailings from mining operations into rivers and waterways without prior permission, in violation of Article 77 of the Water Code of the Philippines:

a. failing to design the Maguila-Guila Dam to withstand heavy seasonal rainfall and/or typhoons;

b. failing to construct the Maguila-Guila Dam to withstand heavy seasonal rainfall and/or typhoons;

c. failing to rebuild the Maguila-Guila Dam so as to prevent toxic silt from flowing into the Mogpog River; and

d. failing to rebuild the Maguila-Guila Dam properly, and in the manner best calculated to insure the safety of the Marinduquenos downriver.

231. In regard to the Boac River, the following acts and/or omissions by Placer Dome, among others, constituted the felony offense of dumping tailings

from mining operations into rivers and waterways without prior permission, in violation of Article 77 of the Water Code of the Philippines:

a. failing to perform an environmental risk assessment of the Tapian Pit before beginning to dump mine tailings into it;

b. failing to construct the original plug in the drainage tunnel so as to prevent mine tailings from seeping into the Boac River through the drainage tunnel;

c. failing to construct the original plug in the drainage tunnel so as to withstand the pressure generated when Placer Dome's engineers drilled into the drainage tunnel to install the second plug;

d. drilling into the drainage tunnel to install the second plug with disregard for the consequences on the original plug and the drainage tunnel, and without regard for the possibility of a plug and tunnel collapse; and

e. failing to repair the plug in the drainage tunnel within a reasonable time.

232. These acts and omissions by Placer Dome, among others, constituted the felony offense of dumping tailings from mining operations into rivers and waterways without prior permission that proximately caused injury to the Province and the people of Marinduque. As a direct and proximate

result of such injury, the Province and the people of Marinduque incurred very substantial damages.

COUNT 5: VIOLATIONS OF THE PHILIPPINE FISHERIES DECREE OF 1975

233. The Province incorporates by reference the allegations contained above.

234. Pursuant to Article 100 of the Philippine Revised Penal Code, Placer Dome is civilly liable for damages resulting from the commission of any felony offense in connection with operations at the Mines.

235. In regard to Calancan Bay, the following acts and/or omissions by Placer Dome, among others, constituted the felony offense of discharging "mining" tailings into Philippine waters, in violation of Section 37 of the Philippine Fisheries Decree of 1975:

a. dumping mine tailings at the surface level of Calancan Bay in disregard of the permit requirement that tailings be buried beneath the bay;

b. dumping mine tailings at the surface level of Calancan Bay in disregard of the environmental damage being caused to the bay and the surrounding area; and

c. dumping mine tailings at the surface level of Calancan Bay in disregard of the health problems being suffered by the Marinduquenos as a result of the environmental damage.

236. In regard to the Mogpog River, the following acts and/or omissions by Placer Dome, among others, constituted the felony offense of discharging "mining" tailings into Philippine waters, in violation of Section 37 of the Philippine Fisheries Decree of 1975:

a. failing to design the Maguila-Guila Dam to withstand heavy seasonal rainfall and/or typhoons;

b. failing to construct the Maguila-Guila Dam to withstand heavy seasonal rainfall and/or typhoons;

c. failing to rebuild the Maguila-Guila Dam so as to prevent toxic silt from flowing into the Mogpog River; and

d. failing to rebuild the Maguila-Guila Dam properly, and in the manner best calculated to insure the safety of the Marinduquenos downriver.

237. In regard to the Boac River, the following acts and/or omissions by Placer Dome, among others, constituted the felony offense of discharging "mining" tailings into Philippine waters, in violation of Section 37 of the Philippine Fisheries Decree of 1975:

a. failing to perform an environmental risk assessment of the Tapian Pit before beginning to dump mine tailings into it;

b. failing to construct the original plug in the drainage tunnel so as to prevent mine

tailings from seeping into the Boac River through the drainage tunnel;

c. failing to construct the original plug in the drainage tunnel so as to withstand the pressure generated when Placer Dome's engineers drilled into the drainage tunnel to install the second plug;

d. drilling into the drainage tunnel to install the second plug with disregard for the consequences on the original plug and the drainage tunnel, and without regard for the possibility of a plug and tunnel collapse; and

e. failing to repair the plug in the drainage tunnel within a reasonable time.

238. These acts and omissions by Placer Dome, among others, constituted the felony offense of discharging "mining" tailings into Philippine waters that proximately caused injury to the Province and the people of Marinduque. As a direct and proximate result of such injury, the Province and the people of Marinduque incurred very substantial damages.

COUNT 6: VIOLATIONS OF THE PHILIPPINE NATIONAL POLLUTION CONTROL DECREE OF 1976

239. The Province incorporates by reference the allegations contained above.

240. Pursuant to Article 100 of the Philippine Revised Penal Code, Placer Dome is civilly liable for

damages resulting from the commission of any felony offense in connection with operations at the Mines.

241. In regard to Calancan Bay, the following acts and/or omissions by Placer Dome, among others, constituted the felony offense of disposing of a substance that causes "pollution" into the water, air, and/or land of the Philippines, in violation of Section 8 of the Philippine National Pollution Control Decree of 1976:

a. dumping mine tailings at the surface level of Calancan Bay in disregard of the permit requirement that tailings be buried beneath the bay;

b. dumping mine tailings at the surface level of Calancan Bay in disregard of the environmental damage being caused to the bay and the surrounding area; and

c. dumping mine tailings at the surface level of Calancan Bay in disregard of the health problems being suffered by the Marinduquenos as a result of the environmental damage.

242. In regard to the Mogpog River, the following acts and/or omissions by Placer Dome, among others, constituted the felony offense of disposing of a substance that causes "pollution" into the water, air, and/or land of the Philippines, in violation of Section 8 of the Philippine National Pollution Control Decree of 1976:

a. failing to design the Maguila-Guila Dam to withstand heavy seasonal rainfall and/or typhoons;

b. failing to construct the Maguila-Guila Dam to withstand heavy seasonal rainfall and/or typhoons;

c. failing to rebuild the Maguila-Guila Dam so as to prevent toxic silt from flowing into the Mogpog River; and

d. failing to rebuild the Maguila-Guila Dam properly, and in the manner best calculated to insure the safety of the Marinduquenos downriver.

243. In regard to the Boac River, the following acts and/or omissions by Placer Dome, among others, constituted the felony offense of disposing of a substance that causes "pollution" into the water, air, and/or land of the Philippines, in violation of Section 8 of the Philippine National Pollution Control Decree of 1976:

a. failing to perform an environmental risk assessment of the Tapian Pit before beginning to dump mine tailings into it;

b. failing to construct the original plug in the drainage tunnel so as to prevent mine tailings from seeping into the Boac River through the drainage tunnel;

c. failing to construct the original plug in the drainage tunnel so as to withstand the

pressure generated when Placer Dome's engineers drilled into the drainage tunnel to install the second plug;

d. drilling into the drainage tunnel to install the second plug with disregard for the consequences on the original plug and the drainage tunnel, and without regard for the possibility of a plug and tunnel collapse; and

e. failing to repair the plug in the drainage tunnel within a reasonable time.

244. These acts and omissions by Placer Dome, among others, constituted the felony offense of disposing of a substance that causes "pollution" into the water, air, and/or land of the Philippines that proximately caused injury to the Province and the people of Marinduque. As a direct and proximate result of such injury, the Province and the people of Marinduque incurred very substantial damages.

COUNT 7: VIOLATIONS OF THE PHILIPPINE NATIONAL WATER AND AIR POLLUTION CONTROL COMMISSION ACT

245. The Province incorporates by reference the allegations contained above.

246. Pursuant to Article 100 of the Philippine Revised Penal Code, Placer Dome is civilly liable for damages resulting from the commission of any felony offense in connection with operations at the Mines.

247. In regard to Calancan Bay, the following acts and/or omissions by Placer Dome, among others, constituted the felony offense of disposing of matter that causes "pollution" into the waters and/or into the air of the Philippines, in violation of Section 9 of the Philippine National Water and Air Pollution Control Commission Act:

a. dumping mine tailings at the surface level of Calancan Bay in disregard of the permit requirement that tailings be buried beneath the bay;

b. dumping mine tailings at the surface level of Calancan Bay in disregard of the environmental damage being caused to the bay and the surrounding area; and

c. dumping mine tailings at the surface level of Calancan Bay in disregard of the health problems being suffered by the Marinduquenos as a result of the environmental damage.

248. In regard to the Mogpog River, the following acts and/or omissions by Placer Dome, among others, constituted the felony offense of disposing of matter that causes "pollution" into the waters and/or into the air of the Philippines, in violation of Section 9 of the Philippine National Water and Air Pollution Control Commission Act:

a. failing to design the Maguila-Guila Dam to withstand heavy seasonal rainfall and/or typhoons;

b. failing to construct the Maguila-Guila Dam to withstand heavy seasonal rainfall and/or typhoons;

c. failing to rebuild the Maguila-Guila Dam so as to prevent toxic silt from flowing into the Mogpog River; and

d. failing to rebuild the Maguila-Guila Dam properly, and in the manner best calculated to insure the safety of the Marinduquenos downriver.

249. In regard to the Boac River, the following acts and/or omissions by Placer Dome, among others, constituted the felony offense of disposing of matter that causes "pollution" into the waters and/or into the air of the Philippines, in violation of Section 9 of the Philippine National Water and Air Pollution Control Commission Act:

a. failing to perform an environmental risk assessment of the Tapian Pit before beginning to dump mine tailings into it;

b. failing to construct the original plug in the drainage tunnel so as to prevent mine tailings from seeping into the Boac River through the drainage tunnel;

c. failing to construct the original plug in the drainage tunnel so as to withstand the pressure generated when Placer Dome's engineers drilled into the drainage tunnel to install the second plug;

d. drilling into the drainage tunnel to install the second plug with disregard for the consequences on the original plug and the drainage tunnel, and without regard for the possibility of a plug and tunnel collapse; and

e. failing to repair the plug in the drainage tunnel within a reasonable time.

250. These acts and omissions by Placer Dome, among others, constituted the felony offense of disposing of matter that causes "pollution" into the waters and/or into the air of the Philippines that proximately caused injury to the Province and the people of Marinduque. As a direct and proximate result of such injury, the Province and the people of Marinduque incurred very substantial damages.

COUNT 8: VIOLATIONS OF THE PHILIPPINE MINING ACT OF 1995

251. The Province incorporates by reference the allegations contained above.

252. Pursuant to Article 100 of the Philippine Revised Penal Code, Placer Dome is civilly liable for damages resulting from the commission of any felony offense in connection with operations at the Mines.

253. The following acts and/or omissions by Placer Dome, among others, constituted the felony offense of willfully violating or grossly neglecting to abide by the terms and conditions of an Environmental Compliance Certificate ("ECC"), in

violation of Section 108 of the Philippine Mining Act of 1995:

a. drilling into the drainage tunnel to install the second plug with disregard for the consequences on the original plug and the drainage tunnel, and without regard for the possibility of a plug and tunnel collapse; and

b. failing to repair the plug in the drainage tunnel within a reasonable time.

254. These acts and omissions by Placer Dome, among others, constituted the felony offense of willfully violating or grossly neglecting to abide by the terms and conditions of an ECC that proximately caused injury to the Province and the people of Marinduque. As a direct and proximate result of such injury, the Province and the people of Marinduque incurred very substantial damages.

COUNT 9: QUASI-DELICT (NEGLIGENCE)

255. The Province incorporates by reference the allegations contained above.

256. At all relevant times herein, Placer Dome owed a duty of care to the Province and the people of Marinduque to conduct all operations related to the Mines in a reasonable manner.

257. In regard to Calancan Bay, Placer Dome breached its duty of care to the Province and the people of Marinduque by committing, among others, the following acts of negligence:

a. dumping mine tailings at the surface level of Calancan Bay in disregard of the permit requirement that tailings be buried beneath the bay;

b. dumping mine tailings at the surface level of Calancan Bay in disregard of the environmental damage being caused to the bay and the surrounding area; and

c. dumping mine tailings at the surface level of Calancan Bay in disregard of the health problems being suffered by the Marinduquenos as a result of the environmental damage.

258. In regard to the Mogpog River, Placer Dome breached its duty of care to the Province and the people of Marinduque by committing, among others, the following acts of negligence:

a. failing to design the Maguila-Guila Dam to withstand heavy seasonal rainfall and/or typhoons;

b. failing to construct the Maguila-Guila Dam to withstand heavy seasonal rainfall and/or typhoons;

c. failing to rebuild the Maguila-Guila Dam so as to prevent toxic silt from flowing into the Mogpog River; and

d. failing to rebuild the Maguila-Guila Dam properly, and in the manner best

calculated to insure the safety of the Marinduquenos downriver.

259. In regard to the Boac River, Placer Dome breached its duty of care to the Province and the people of Marinduque by committing, among others, the following acts of negligence:

a. failing to perform an environmental risk assessment of the Tapian Pit before beginning to dump mine tailings into it;

b. failing to construct the original plug in the drainage tunnel so as to prevent mine tailings from seeping into the Boac River through the drainage tunnel;

c. failing to construct the original plug in the drainage tunnel so as to withstand the pressure generated when Placer Dome's engineers drilled into the drainage tunnel to install the second plug;

d. drilling into the drainage tunnel to install the second plug with disregard for the consequences on the original plug and the drainage tunnel, and without regard for the possibility of a plug and tunnel collapse; and

e. failing to repair the plug in the drainage tunnel within a reasonable time.

260. These acts and omissions by Placer Dome, among others, constituted negligence that proximately caused injury to the Province and the

people of Marinduque. As a direct and proximate result of such injury, the Province and the people of Marinduque incurred very substantial damages.

COUNT 10: QUASI-DELICT (PUBLIC AND/OR PRIVATE NUISANCE)

261. The Province incorporates by reference the allegations contained above.

262. Pursuant to Article 694 of the Civil Code of the Philippines, Placer Dome is liable for damages resulting from any public and/or private nuisance committed in connection with operations at the Mines, including any act that: (1) injures or endangers the health or safety of others; (2) annoys or offends the senses; (3) shocks, defies or disregards decency or morality; (4) obstructs or interferes with the free passage of any public highway or street, or any body of water; or (5) hinders or impairs the use of property.

263. In regard to Calancan Bay, the following acts and/or omissions by Placer Dome, among others, constituted a public and/or private nuisance:

a. dumping mine tailings at the surface level of Calancan Bay in disregard of the permit requirement that tailings be buried beneath the bay;

b. dumping mine tailings at the surface level of Calancan Bay in disregard of the environmental damage being caused to the bay and the surrounding area; and

c. dumping mine tailings at the surface level of Calancan Bay in disregard of the health problems being suffered by the Marinduquenos as a result of the environmental damage.

264. In regard to the Mogpog River, the following acts and/or omissions by Placer Dome, among others, constituted a public and/or private nuisance:

a. failing to design the Maguila-Guila Dam to withstand heavy seasonal rainfall and/or typhoons;

b. failing to construct the Maguila-Guila Dam to withstand heavy seasonal rainfall and/or typhoons;

c. failing to rebuild the Maguila-Guila Dam so as to prevent toxic silt from flowing into the Mogpog River; and

d. failing to rebuild the Maguila-Guila Dam properly, and in the manner best calculated to insure the safety of the Marinduquenos downriver.

265. In regard to the Boac River, the following acts and/or omissions by Placer Dome, among others, constituted a public and/or private nuisance:

a. failing to perform an environmental risk assessment of the Tapian Pit before beginning to dump mine tailings into it;

b. failing to construct the original plug in the drainage tunnel so as to prevent mine tailings from seeping into the Boac River through the drainage tunnel;

c. failing to construct the original plug in the drainage tunnel so as to withstand the pressure generated when Placer Dome's engineers drilled into the drainage tunnel to install the second plug;

d. drilling into the drainage tunnel to install the second plug with disregard for the consequences on the original plug and the drainage tunnel, and without regard for the possibility of a plug and tunnel collapse; and

e. failing to repair the plug in the drainage tunnel within a reasonable time.

266. These acts and omissions by Placer Dome, among others, constituted a public and/or private nuisance that proximately caused injury to the Province and the people of Marinduque. As a direct and proximate result of such injury, the Province and the people of Marinduque incurred very substantial damages.

COUNT 11: BREACH OF CONTRACT

267. The Province incorporates by reference the allegations contained above.

268. On or around 1997, Placer Dome caused Marcopper to assign all of its insurance coverages to

Placer Dome pursuant to an Assignment Agreement. Placer Dome thereafter recovered at least $12-13 million of insurance proceeds under one or more of the relevant insurance agreements.

269. The Province and the people of Marinduque are the rightful and intended third-party beneficiaries of insurance agreements related to mine operations on Marinduque, and Placer Dome, as assignee, necessarily had to secure and use the assigned insurance proceeds to undertake and/or cause others to undertake extensive environmental and medical remediation programs on Marinduque.

270. The Province and the people of Marinduque were intended third party beneficiaries of the Assignment Agreement and the underlying insurance agreements.

271. Placer Dome breached its obligations under the relevant agreements by committing, among others, the following acts and/or omissions:

a. failing to secure coverages;

b. failing to use any of the assigned insurance proceeds to undertake the required environmental and medical remediation programs on Marinduque; and

c. failing to use any of the assigned insurance proceeds to cause others to undertake the required environmental remediation and medical monitoring programs on Marinduque.

272. These acts and omissions by Placer Dome, among others, constituted a breach of contract that caused injury to the Province and the people of Marinduque. As a result of such injury, the Province and the people of Marinduque incurred very substantial.

COUNT 12: BREACH OF CONTRACT

273. The Province incorporates by reference the allegations in Paragraphs 1 through X.

274. John Willson's April 11, 1996 letter to then Philippine President Fidel Ramos created a binding contract between Placer Dome, on the one hand, and the Province and the people of Marinduque, on the other hand.

275. In the letter, Willson promised President Ramos that "Placer Dome w[ould] provide full technical and financial support to Marcopper in implementation of compensation and rehabilitation programs." Willson, as President of the company, had the authority to make this promise on Placer Dome's behalf, and his promise was supported by adequate consideration.[3] Moreover, although made in a letter to President Ramos and the government of the Philippines, Willson's promise was directed at the Province and the people of Marinduque. Accordingly, the letter created a binding contract between Placer Dome, on the one hand, and the

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[3] Pursuant to article 1350 of the Civil Code of the Philippines, in "contracts of pure beneficence," "the mere liberality of the benefactor" acts as consideration.

Province and the people of Marinduque, on the other hand.

276. In the alternative, the letter created a binding contract between Placer Dome and the Philippine government, and the Province and the people of Marinduque were intended third party beneficiaries of that contract.

277. Placer Dome breached its contract with the Province and the people of Marinduque by committing, among others, the following acts and/or omissions:

a. failing to fully compensate all victims of the 1996 Boac River disaster;

b. failing to pay sufficient funds into the EGF to fully compensate all victims of the 1996 Boac River disaster;

c. failing to reimburse the Philippine government for expenses incurred and continuing to be incurred in responding to the 1996 Boac River disaster;

d. failing to reimburse the Province for expenses incurred and continuing to be incurred in responding to the 1996 Boac River disaster;

e. failing to ensure third party monitoring of residents' health and of the quality of their drinking water;

f. failing to rehabilitate and remediate the Boac River and the surrounding areas, including the marine areas identified by Willson in the letter;

g. failing to establish flood protection measures and to improve road access for villagers;

h. failing to have an independent third party implement health and environmental monitoring programs; and

i. failing to provide any technical or financial support to implement the "urgent compensation and rehabilitation programs."

278. These acts and omissions by Placer Dome, among others, constituted a breach of contract that caused injury to the Province and the people of Marinduque. As a result of such injury, the Province and the people of Marinduque incurred very substantial damages.

COUNT 13: PROMISSORY ESTOPPEL

279. The Province incorporates by reference the allegations contained above

280. In his April 11, 1996 letter, John Willson, the President of Placer Dome, promised President Ramos that "Placer Dome w[ould] provide full technical and financial support to Marcopper in implementation of compensation and rehabilitation programs." Willson made this promise, on Placer

Dome's behalf, with the intent that the Province and the people of Marinduque would rely on it.

281. The Province and the people of Marinduque did subsequently rely on Willson's promise to their detriment by, among other things, foregoing taking more aggressive civil and criminal actions to compensate victims of the 1996 Boac River disaster and to punish those responsible for causing it.

282. Placer Dome breached Willson's promise by among others things:

a. failing to fully compensate all victims of the 1996 Boac River disaster;

b. failing to pay sufficient funds into the EGF to fully compensate all victims of the 1996 Boac River disaster;

c. failing to reimburse the Philippine government for expenses incurred and continuing to be incurred in responding to the 1996 Boac River disaster;

d. failing to reimburse the Province for expenses incurred and continuing to be incurred in responding to the 1996 Boac River disaster;

e. failing to ensure third party monitoring of residents' health and of the quality of their drinking water;

f. failing to rehabilitate and remediate the Boac River and the surrounding areas, including the marine areas identified by Willson in the letter;

g. failing to establish flood protection measures and to improve road access for villagers;

h. failing to have an independent third party implement health and environmental monitoring programs; and

i. failing to provide any technical or financial support to implement the "urgent compensation and rehabilitation programs."

283. Place Dome should be estopped from failing to perform according to the terms of Willson's and Placer Dome's promises because the Province and the people of Marinduque relied on those promises to their detriment by foregoing pursuing more aggressive civil and criminal actions to compensate victims of the disaster and to punish those responsible for causing it.

284. The Province and the people of Marinduque were injured when they detrimentally relied on Willson's and Placer Dome's promises, As a result of such injury, the Province and the people of Marinduque incurred very substantial damages.

PRAYER

WHEREFORE, the Province respectfully prays that Placer Dome be cited to appear and answer herein, and that upon trial of this cause, judgment be entered in the Province's favor, and against Placer Dome, with. said judgment providing for:

a. An order of the Court directing Placer Dome to undertake and complete (and/or finance the undertaking and completion of) the environmental cleanup of the affected areas of, and restore the natural resources of, Marinduque, including, but not limited to, the Tapian Pit, the San Antonio Pit, Calancan Bay, the Mogpog River system, the Boac River system, downstream coastal areas, and the surrounding areas. This environmental cleanup must include, among other things, ensuring potable water in the region and healthy hunting and fishing grounds, the repair of deteriorating mine structures and the Maguila-Guila Dam, and for the renovating and rehabilitating of the Tapian Pit and the San Antonio Pit;

b. An order of the Court directing Placer Dome to create and fund adequately an environmental monitoring fund;

c. An order of the Court directing Placer Dome to create and fund adequately a medical monitoring fund;

d. An award of damages wholly compensating the Province and the people of Marinduque for the economic and health injustices they have suffered;

e. The maximum award of exemplary damages permitted by law;

f. An award of pre judgment and post judgment interest at the maximum rate permitted by contract, law, or equity;

f. An award of the Province's costs and reasonable attorney's fees; and.

g. Such other and further relief, either equitable or legal, that the Court deems appropriate.

Dated: October 4, 2005 SNELL & WILMER L.L.P.

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(2)

No. 09-944

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IN THE

Supreme Court of the United States

PLACER DOME, INC. AND BARRICK GOLD CORPORATION,
PETITIONERS

v.

PROVINCIAL GOVERNMENT OF MARINDUQUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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COUNTER QUESTIONS PRESENTED

1. Whether the Ninth Circuit and the District Court decided the issues before them in a manner consistent with this Court's holdings in *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 589 U.S. 422 (2007).

2. Whether the Ninth Circuit correctly held that the federal courts lack subject matter jurisdiction over this matter.

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COUNTER STATEMENT

Petitioners Placer Dome, Inc. and Barrick Gold Corporation (collectively, "Barrick") argue that this Court must issue the writ to: (1) remedy an alleged affront to this Court's *Sinochem* decision; and (2) resolve an alleged circuit split regarding the scope of the federal common law of foreign relations. The latter would be accomplished by expanding the federal courts' jurisdiction over cases allegedly premised on the "federal common law of foreign relations" – so as to cover cases, like this one, where nothing on the face of the complaint indicates anything implicating U.S. foreign policy.

Barrick's first argument fails because *Sinochem* does not even apply to this case, where the District Court incorrectly decided the subject matter jurisdiction question in the affirmative before proceeding to consider other grounds for dismissal. Furthermore, the record clearly discloses that both the District Court and the Court of Appeals conducted themselves in accordance with *Sinochem*, and with due respect for and attention to the principles underpinning that decision. Barrick is simply unhappy with the outcome.

Barrick's second argument fails because it was not raised in the lower courts, where Barrick instead attempted to ground its claim to federal jurisdiction in the act of state doctrine. Because Barrick never argued that the federal common law of foreign relations provided jurisdiction, the District Court conducted none of the necessary fact finding to establish

jurisdiction on that basis.[1] In any event, Barrick's claim to jurisdiction would fail under any of the cases it alleges as creating a split between the courts of appeals.

For the reasons set forth below, neither argument warrants any further attention by this Court.

A. FACTUAL BACKGROUND.

Marinduque is a small island province in the Republic of the Philippines.[2] Its inhabitants are some of the most impoverished in the Philippines and depend for survival on subsistence agriculture, animal husbandry, and fishing.[3] Marinduque also has substantial and largely untapped mineral resources, including copper and gold deposits. That mineral wealth has been both a blessing and a curse.

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[1] This newly discovered "split" of authority is allegedly between the Ninth Circuit and the Second, Fifth, and Eleventh Circuits – represented respectively by the decisions in *Republic of the Philippines v. Marcos*, 806 F.2d 344 (2d Cir. 1986), *Torres v. Southern Peru Copper Corporation*, 113 F.3d 540 (5th Cir. 1997) and *Pacheco de Perez v. AT&T Co.*, 139 F.3d 1368 (11th Cir. 1998). It is symptomatic of the argument that Barrick brought only one of these cases to the Court of Appeals' attention – the *Marcos* case – and that mention was made solely to make a point about President Marcos, and not to advise the Court of Appeals of the inter-circuit controversy over the scope of the federal common law of foreign relations that Barrick now claims.

[2] Pet. App. at 113a.

[3] *Id.* at 114a.

Petitioner Placer Dome, Inc. (now Barrick) managed and controlled various open pit mining operations on Marinduque for almost thirty years.[4] During that period, Placer Dome severely polluted the land and waters of Marinduque, and damaged the health of its residents, through the systematic dumping of hundreds of millions of tons of toxic waste into Calancan Bay and through both steady and precipitous releases of hundreds of millions of tons of toxic mine tailings into the inland waters of the island.

As a result of the last and most cataclysmic of these toxic floods, this one in the Boac River Valley, Placer Dome's resident managers were placed under arrest and all mining operations in Marinduque came to a halt. However, on the basis of written promises by the President of Placer Dome that it would resolve the problems caused by these mining disasters through a program of remediation and compensation, the resident managers were released.

Nevertheless, shortly thereafter, Placer Dome divested itself of its Philippine operations, and it, its resident managers – and even the insurance money relating to the Boac River disaster – departed the island. The mines have never been re-opened. The environmental, economic, and public health damage to the island and its people has never been remedied.

Since 1997, the Philippine authorities and the Marinduqueño people have sought to hold Placer Dome and subsequently Barrick accountable for its actions on the island. However, every public and private effort to

[4] *See, e.g.*, Pet. App. at 23a.

seek a remedy in the Philippines has been thwarted by Placer Dome's departure, by Placer Dome/Barrick's refusals to return, and even by their in-court denials that Placer Dome was ever there.

In consequence, nearly five years ago, the Province of Marinduque pursued Placer Dome/Barrick to Nevada, the operational center of Barrick's worldwide operations, and brought suit there, in a state court of general jurisdiction, on behalf of itself and its people. For each of those five years, Barrick has placed one procedural obstacle after another in the way of a resolution on the merits. The Barrick petition for certiorari is only the latest such effort.

B. THE PROCEEDINGS BELOW.

1. *Proceedings In The District Court.*

When Barrick removed the case to federal court for the District of Nevada, it based its removal on federal question jurisdiction, alleging that the case gave rise to questions of international law and foreign relations and therefore that it raised a "federal question."[5]

Initially, the Province took no position on that removal, as it was content to litigate the case either in federal or state court in Nevada. The Province only sought to have the jurisdictional issue resolved when it appeared that an already suspect removal was just the prelude to further delay and forum shopping. To avoid

[5] Pet. App. at 4a.

that result, and to obtain a jurisdictional ruling from the court that would fix the forum once and for all, the Province moved for an order requiring Barrick to show cause why the matter should not be remanded to state court for lack of subject matter jurisdiction.[6]

By way of an order not contained in Barrick's Appendix, the District Court denied the motion to show cause. It observed that, under Barrick's theory and the authorities relied upon, the court "must determine that the allegations in Plaintiff's Complaint require the Court to evaluate any act of state or apply any principal of international law before it can assert jurisdiction."[7]

The District Court then analyzed those allegations in the complaint concerning actions taken by the Philippine government, and concluded that "Plaintiff's Complaint is replete with allegations

[6] In its petition, Barrick insinuates from the show cause and other related filings that the Province agreed that the District Court had subject matter jurisdiction. Pet. at 24. Setting aside the fact that parties may not confer subject matter jurisdiction by agreement, *see, e.g.*, *Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1261 (11th Cir. 2000), Barrick misinterprets the Province's filings. First, the Province's November 7, 2005 statement in respect of removal, Pet. App. at 82a-85a, is not a concession regarding the propriety of federal subject matter jurisdiction. Rather, by way of the pleading the Province recognized that, in certain cases, jurisdiction may be based on the federal common law of foreign relations, but questioned whether that theory had any application, given the facts of this case. Pet. App. at 83a-84a. Second, the Province's April 9, 2006 reply in support of its motion to show cause took the ultimate position that no foreign relations jurisdiction arose in this case, and that a remand to state court would be required.

[7] Resp. App. at 7b.

regarding the Philippine Government's activities, which contributed to the environmental harm that Plaintiff has suffered."[8] Based upon that (incorrect) assessment, the District Court concluded that "[b]ecause the allegations in Plaintiff's Complaint require this Court to evaluate the acts of a foreign state, this Court has federal question jurisdiction over this action."[9]

Once the District Court denied the requested remand for lack of subject matter jurisdiction, Barrick pressed its efforts to dismiss the Province's case on lack of personal jurisdiction and *forum non conveniens* grounds. That was so despite Barrick's extensive presence in Nevada, and despite Barrick's long-time involvement in the Philippines (the situs of events for virtually all of the relevant acts). Remarkably, Barrick's *forum non conveniens* motion sought to have the case dismissed in favor of a Vancouver, British Columbia forum.

While the parties were preparing to conduct discovery regarding the personal jurisdiction issues, this Court handed down its decision in *Sinochem*. In response, the District Court stayed the pending discovery in order to consider the *forum non conveniens* issue, and Barrick dropped its personal

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[8] *Id.*

[9] *Id.* (citing *Patrickson v. Dole Food Co.*, 251 F.3d 795, 799 (9th Cir. 2001)). The District Court's opinion did not address any aspect of the alleged federal common law of foreign relations other than the act of state doctrine, or note any facts in the case that would support any other federal common law of foreign relations theory not involving the act of state doctrine.

jurisdiction motion in favor of a new motion (with new affidavits) directed only to the *forum non conveniens* issue. The Province argued that the *Gilbert* factors favored Nevada, but, in the alternative, that the Philippines should be considered as the proper forum. The Province also argued that the District Court should condition any dismissal on Barrick's consent to litigate this case in the Philippines.

However, the District Court dismissed the case on *forum non conveniens* grounds in favor of a British Columbia forum.[10] In addressing the *forum non conveniens* issue, the District Court considered the forum in which the plaintiff filed suit (Nevada) and the forum proposed by the defendants (British Columbia), but expressly refused to consider the forum that constituted the location of all relevant events (the Philippines).[11]

The Province sought reconsideration, seeking a remand to state court based upon the absence of

[10] Pet. App. at 26a. In that order the District Court suggested that the existence of subject matter jurisdiction was still an open question before it. Moreover, despite its earlier subject matter jurisdiction ruling, the Court also noted that Barrick took the position at oral argument that no issues of American law were raised by the complaint or at issue in the case. *Id.* at 27a 28a. Given that contradiction between Barrick's oral argument statements and its briefing in favor of "federal question" jurisdiction, the Province's motion for reconsideration was inevitable. *Id.* at 28a.

[11] *Id.* at 59a-60a. Though most of the *Gilbert* factors favored the retention of the Nevada forum (as between Nevada and British Columbia), the Court granted dismissal on *forum non conveniens* grounds in favor of British Columbia.

subject matter jurisdiction as well as the reversal of the *forum non conveniens* dismissal.[12] In response, the District Court recognized the confusion created by its dismissal order, but explained that its dismissal order "should not be understood as a determination by this Court that it lacks subject matter jurisdiction," and then concluded "as it did before, that subject matter jurisdiction does, in fact, exist in this case, based upon the act of state doctrine."[13] It then explained that its subject matter jurisdiction ruling did not prevent it from dismissing on *forum non conveniens* grounds without first deciding *personal* jurisdiction.[14]

At no time did the District Court conduct any fact-finding with regard to the practical effect of the Province's complaint upon foreign relations between the United States and the Philippines, nor did the District Court (or Barrick) seek any briefing or other intervention from the governments of the Philippines or the United States.

Thus, in two separate rulings, the District Court assumed subject matter jurisdiction on the theory that the case invoked federal question jurisdiction under the act of state doctrine. In neither instance did the court

[12] *See id.* at 62a.

[13] *Id.* at 63a-64a.

[14] *Id.* at 64a. Of course, Barrick had already abandoned its personal jurisdiction motion by then, and neither party was insisting that any personal jurisdiction issues be decided before the *forum non conveniens* issue was decided.

assume federal question jurisdiction under the related "federal common law of foreign relations."

2. *Proceedings In The Court Of Appeals.*

On appeal, Barrick attempted to argue, first, that the District Court had not really decided subject matter jurisdiction.[15] The Court of Appeals quickly rejected that position, explaining that the District Court had twice confirmed its finding of subject matter jurisdiction – first in its order denying the motion to show cause and then in its order on reconsideration of the dismissal.[16] As the Court of Appeals put it, Barrick was "misapprehending" the proceedings below; and it was "abundantly clear that the District Court concluded it had subject matter jurisdiction over this suit."[17]

Having established that the District Court had decided that it had subject matter jurisdiction before dismissing on *forum non conveniens* grounds, the Court of Appeals then assessed the effect of *Sinochem* on its own analysis. As a result of that effort, it concluded that *Sinochem* did not bar its review of the

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[15] *See* Resp. App. at 10b (suggesting falsely that: "In short, after the Supreme Court decided *Sinochem*, the district court never wavered from its view that it could dismiss this case on *forum non conveniens* grounds without deciding subject matter jurisdiction.").

[16] Pet. App. at 8a. Barrick nevertheless asserts the same wholly counterfactual position here. Pet. at 3, 12-13.

[17] Pet. App. at 8a.

District Court's jurisdictional ruling,[18] especially because "the question of subject-matter jurisdiction here is not particularly complex."[19]

In addressing the basis on which Barrick had asserted its claim to subject matter jurisdiction below – the alleged presence of act of state issues – the Court of Appeals explained first that the act of state doctrine "precludes courts from evaluating the validity of actions that a foreign government has taken within its own borders"[20] and, second, that "[a]ct of state issues only arise when a court *must decide* – that is, when the outcome of the case turns upon – the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine."[21]

The Court of Appeals also explained that such a determination depends exclusively on the content of the complaint. That was so because "the presence or absence of federal question jurisdiction is governed by the 'well-pleaded complaint rule' – which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint."[22]

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[18] *Id.* at 10a.

[19] *Id.*

[20] *Id.* (citations omitted).

[21] *Id.* at 12a (quoting *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 406 (1990) (emphasis in original)).

[22] *Id.* at 16a (quoting *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 475 (1998)).

Within that analytical framework, the Court of Appeals then reviewed the allegations contained in the Province's complaint, only to conclude that none of the supposed acts of state identified by the District Court were essential elements of the Province's claims."[23]

In reaching that conclusion, the Court of Appeals explained that:

> to prove that Barrick violated the various provisions of Philippine law that the Province sued under, such as reckless and simple imprudence, the Province need not prove the validity or invalidity of an act of state. For example, proving that Barrick was reckless when it hastily built the Maguila-Guila dam, which allegedly collapsed only two years after being built, does not implicate, let alone require, any act of state. Rather, invocation of the act of state doctrine here would be via Barrick's defenses to the Province's claims and as such cannot support removal jurisdiction.[24]

Finally, the Court of Appeals noted that none of the policy considerations underlying the act of state doctrine were implicated by the Province's claims.

More specifically, the Court of Appeals observed that, because any issues involving the corrupt actions of former President Ferdinand Marcos were not likely to

[23] *Id.* at 17a.

[24] *Id.* at 18a.

impact current foreign relations, there was no justification for leaving such issues within the exclusive realm of the political branches.[25] Such foreign policy concerns were especially unlikely to be implicated, the Court of Appeals further explained, when the current Philippine government has also repudiated and openly condemned the conduct of its past president.[26] As the Court summed it up, "the parties' dispute as framed by the complaint does not require us to pass on the validity of the Philippines' governmental actions."[27]

Based on its analysis of the unique facts in the complaint, the panel therefore concluded, correctly, that because the Province's complaint did not raise a federal question under the act of state doctrine, the District Court was without jurisdiction.[28] Accordingly, the Court of Appeals found Barrick's removal improper, reversed the District Court's rulings, and remanded the case with instructions that the District Court remand the case to state court.[29]

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[25] *Id.* at 19a-20a (quoting *Sabbatino*, 376 U.S. at 428).

[26] *Id.* at 20a (citing *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1360-61 (9th Cir. 1988) (en banc) for the proposition that "when a ruler's former domain has turned against him and seeks the recovery of what it claims he has stolen, the classification [of Marcos's past acts as 'acts of state'] has little or no applicability.")

[27] *Id.*

[28] *Id.* at 20a-21a.

[29] *Id.* at 21a. Barrick's attempt to obtain a panel rehearing and/or a rehearing *en banc* also failed, and an order denying those rehearing petitions was entered on November 12, 2009. *See id.* at 74a.

REASONS FOR DENYING THE PETITION.

A. THE COURTS BELOW DECIDED THE ISSUES BEFORE THEM IN ACCORDANCE WITH THIS COURT'S RULINGS IN *SINOCHEM* AND RELATED CASES.

Barrick's first argument is that the Court of Appeals so egregiously affronted the letter and spirit of this Court's holdings in *Sinochem International Col, Ltd. v. Malaysia International Shipping Corp.*[30] that this Court must grant *certiorari* to save its *Sinochem* opinion.[31] Barrick can only make that argument by mischaracterizing -- in order – *Sinochem*, the decisions of the District Court, and the holdings of the Court of Appeals.

[30] 549 U.S. 422 (2007).

[31] The only specific claim made in Barrick's first argument is that the Court of Appeals' decision improperly restricted the discretion that *Sinochem* granted to the district and appellate courts. *See* Pet. at 1, 2-3, 11-14. That argument is addressed at pp. 23-25, *infra*. Another part of Barrick's first question asks whether the Ninth Circuit applied an incorrect standard of review. However, the petition does not thereafter explain why the well-settled rule that a district court decision regarding subject matter jurisdiction is reviewed *de novo* is no longer applicable. Nor does it identify any standard that should have been employed by the Ninth Circuit in lieu of the *de novo* standard of review that actually was employed. Pet. App. at 7a. As Barrick offers no argument in support of this sub-issue, it cannot and need not be addressed further.

I. The *Sinochem* Decision.

a. Steel Co. And The Problem of Hypothetical Jurisdiction.

This Court's *Sinochem* opinion is one of a sequence in which this Court has wrestled with the tensions between assuring that its powers to adjudicate cases and controversies were not extended beyond their constitutional and statutory boundaries, and the practical problems that arise when a relatively simple route to the resolution of a case, even a resolution on the merits, is blocked by the real or perceived need to decide the jurisdictional issue first.

That tension has always been present in the federal courts, but its modern discussion began with this Court's decision in *Steel Co. v. Citizens for a Better Environment* ("*Steel Co.*").[32] As the *Sinochem* Court itself clearly understood, the holdings of *Sinochem* cannot be understood without reference to the *Steel Co.* decision and its progeny.[33]

In *Steel Co.*, this Court weighed in on the potential evils of what it called the "doctrine of hypothetical jurisdiction," by which the federal courts had become, in the *Steel Co.* majority's view, too facile in "'assuming' jurisdiction for the purpose of deciding the merits."[34] And while this Court unanimously

[32] 523 U.S. 83 (1998).

[33] *Sinochem*, 549 U.S. at 430-431.

[34] *Steel Co.*, 523 U.S. at 93-94.

agreed that jurisdiction was lacking in the particular case before the *Steel Co.* Court, and that the jurisdictional issue should have been decided before proceeding to the merits, the *Steel Co.* Court was not agreed as to the necessity of a federal court determining its own jurisdiction – before proceeding onward – in all cases.

The *Steel Co.* majority view was clear, however. Even as it conceded that the Court's own record in such matters was somewhat spotty, and that there were exceptions to the general rule, the majority insisted on an antecedent determination of subject matter jurisdiction.[35]

> While some of the above cases must be acknowledged to have diluted the absolute purity of the rule that Article III jurisdiction is always an antecedent question, none of them even approaches approval of a doctrine of "hypothetical jurisdiction" that enables a court to resolve contested questions of law when its jurisdiction is in doubt. Hypothetical jurisdiction produces nothing more than a hypothetical judgment – which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning. . . . Much more than legal niceties are at stake here. The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even

[35] *Id.* at 101 (internal citations omitted).

> restraining them from acting permanently regarding certain subjects. . . . For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*.

The four *Steel Co.* concurring opinions were far less absolute in their approach to the sequencing of judicial decision-making in the face of jurisdictional questions. Justice Breyer's concurrence was representative of this view:[36]

> . . . federal courts often, and typically should, decide standing questions at the outset of a case. That order of decision (first jurisdiction then the merits) helps better to restrict the use of the federal courts to those adversarial disputes that Article III defines as the federal judiciary's business. But my qualifying words "often" and "typically" are important. The Constitution, in my view, does not require us to replace those words with the word "always." The Constitution does not impose a rigid judicial "order of operations," when doing so would cause serious practical problems.

b. Ruhrgas and Sinochem.

Steel Co. remains good law, and its general rule that jurisdictional issues should be resolved first, before addressing the merits, remains vital today. However,

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[36] *Id.* at 111 (Breyer, J. concurring).

the tension between good Constitutional and statutory form and the need for practical case analysis has not disappeared in the interim, with the result that exceptions to the general rule of *Steel Co.* have also been recognized during that same period. That has been especially true where the Court is not contemplating a disposition on the merits, but addressing what is generally denominated as a threshold issue.

In the *Ruhrgas* case,[37] for instance, this Court held that a district court could, in at least some circumstances, dismiss a case for lack of personal jurisdiction without first undertaking an analysis of its subject matter jurisdiction. In *Sinochem*, of course, this Court held that, in at least some circumstances, a district court could dismiss a case on *forum non conveniens* grounds, without first establishing its subject matter jurisdiction.

But neither *Ruhrgas* nor *Sinochem* converted a district court's early decision on subject matter jurisdiction to a "discretionary" decision. To the extent a district court has discretion, it is to pass on a difficult and complex question of subject matter jurisdiction in favor of an easier path to dismissal. But if – as here – a district court in fact rules on a subject matter jurisdiction question that is not complex or difficult prior to considering alternative grounds for dismissal, that ruling is subject to *de novo* review. Nothing in *Ruhrgas* or *Sinochem* cast any doubt on that well-established rule.

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[37] *Ruhrgas, AG v. Marathon Oil Co.*, 526 U.S. 574 (1999).

Furthermore, in neither of these cases did the unanimous court that issued them give wholly unlimited discretion to the district courts. In the *Ruhrgas* case, the Court concluded its opinion with an important limitation:[38]

> [W]e recognize that in most instances subject matter jurisdiction will involve no arduous inquiry. . . . In such cases, both expedition and sensitivity to state courts' coequal stature should compel the district court to dispose of that issue first. . . . Where, as here, however, a district court has before it a straightforward personal jurisdiction issue presenting no complex issue of state law, and the alleged defect in subject matter jurisdiction raises a difficult and novel question, the court does not abuse its discretion by turning directly to personal jurisdiction.

Sinochem also concluded with a similar cautionary limitation that, like *Ruhrgas*, paid homage to *Steel Co.'s* holding that "jurisdictional questions ordinarily must precede merits determinations in dispositional order."[39] More specifically, after noting that *Sinochem's* unique facts made it "a textbook case

[38] *Id.* at 587-588.

[39] *Sinochem*, 549 U.S. at 431.

for immediate *forum non conveniens* dismissal,"[40] Justice Ginsburg, writing for a unanimous court, held:[41]

> If, however, a court can readily determine that it lacks jurisdiction over the cause or the defendant, the proper course would be to dismiss on that ground. In the mine run of cases, jurisdiction "will involve no arduous inquiry" and both judicial economy and the consideration ordinarily accorded to the plaintiff's choice of forum 'should impel the federal court to dispose of [those] issue[s] first. . . . But where subject matter or personal jurisdiction is difficult to determine, and *forum non conveniens* consideration weigh heavily in favor of dismissal, the court properly takes the less burdensome course.

These limitations on the discretion that *Sinochem* afforded to the district courts are important parts of that opinion, and of a body of jurisprudence this Court has evolved to balance its concerns for the proper exercise of judicial power against the practical needs of

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[40] *Id.* at 435 (citations omitted; quoting *Ruhrgas*, 526 U.S. at 587-88).

[41] *Sinochem*, 549 U.S. at 436. Note that *Sinochem's* comments *as to subject matter jurisdiction* were *dicta* because both lower courts in the *Sinochem* case had found admiralty or maritime jurisdiction over the matter, *see Malaysia International Shipping Corp. v. Sinochem International Co., Ltd.*, 436 F.3d 349, 354-58 (3d Cir. 2006), and that subject matter jurisdiction decision was not appealed to the Supreme Court. *See Sinochem*, 127 S. Ct. at 1190. *See also* the *Sinochem* petition for *certiorari* at 2006 WL 2056376 (July 21, 2006).

court administration. Furthermore, nothing in *Sinochem* or its progeny offered district courts the discretion to simply "assume" subject matter jurisdiction for a case removed from state court in order to reach an alternate ground for dismissal that would not result in a remand back to that state court.

Yet the fundamental tenet upon which Barrick grounds its *Sinochem* argument is the perception that these cautionary notes can be read out of the *Sinochem* decision, and ignored, and that *Sinochem* can be interpreted to re-embrace an untrammeled discretion to ignore the jurisdictional issues – *i.e.*, a new era of "hypothetical jurisdiction." Only then, if *Sinochem* is so misinterpreted, can Barrick argue that the courts below contravened *Sinochem*.

In fact, the reverse is true. When it came to the actual sequence of judicial decision-making employed in this case by both the District Court and the Court of Appeals – deciding subject matter jurisdiction before deciding *forum non conveniens* issues – both courts were wholly in sync with *Sinochem*. The fact that the District Court erred in its analysis of the subject matter jurisdiction issues did not change the propriety of that court's sequencing of the issue. The subject matter jurisdiction error could be, and was, independently cured on appeal.

2. The District Court's Fidelity to *Sinochem*.

The procedural history in the District Court shows that this case simply is not postured in the

manner for further review, and there is no basis for a writ to be issued.

In this case, the District Court ruled on subject matter jurisdiction by concluding that such jurisdiction existed here on act of state grounds. After making that ruling, the District Court lacked any *Sinochem* discretion to simply pass on the question of subject matter jurisdiction, as that would require the court to pretend that it had not considered the question. Thus, in this case, *Sinochem* was never even implicated.

Even if *Sinochem* had somehow provided the District Court with the discretion to avoid the consequences of its earlier subject matter jurisdiction decision - which, if it had been decided correctly would have resulted in a remand to state court long before the *forum non conveniens* question was ever reached, Sinochem itself would block any exercise of that discretion. That is so because *Sinochem* limits a court's ability to decide a *forum non conveniens* motion (before deciding subject matter jurisdiction) to that class of cases "where subject matter or personal jurisdiction is difficult to determine, and *forum non conveniens* considerations weigh heavily in favor of dismissal."[42]

Indeed, the subject matter jurisdiction question in this case was not difficult to determine.[43] This case was the usual one in which "a court can readily determine that it lacks jurisdiction over the cause or

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[42] *Sinochem*, 549 U.S. at 436.

[43] As the Court of Appeals put it, "the question of subject matter jurisdiction here is not particularly complex." Pet App. at 10a.

the defendant [and therefore one in which] the proper course would be to dismiss on that ground."[44] As the *Sinochem* Court also wrote, "in the mine run of cases, jurisdiction will involve no arduous inquiry and both judicial economy and the consideration ordinarily accorded the plaintiff's choice of forum should impel the federal court to dispose of those issues first."[45]

No "arduous inquiry" was required here.[46] The District Court only needed to: (1) read the Province's well-pleaded complaint; and (2) on the basis of that reading determine that the Province's assertion of Philippine law claims against two private multinationals operationally centered in Nevada did not depend on the resolution of a substantial question of the federal common law of U.S. foreign relations or require a decision on a matter properly considered to be an act of state.

Accordingly, even under *Sinochem*, **this** district court was obliged to address **this** subject matter jurisdiction issue in **this** case before addressing *forum non conveniens*. To be sure, to the extent it did base its subject matter jurisdiction ruling on an erroneous analysis of the act of state doctrine, it did err. Where it

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[44] *Sinochem*, 549 U.S. at 436.

[45] *Id.*

[46] The *forum non conveniens* factors also did not "weigh heavily" in favor of a Vancouver forum. As to the latter, the District Court found only two of thirteen *Gilbert* factors favoring Vancouver and neither actually favored that forum. Moreover, if the District Court had not arbitrarily refused to even consider a Philippine forum, none of those factors would have favored Vancouver.

did *not* err was in deciding the subject matter jurisdiction issue first. In that respect, the District Court, writing both before and after *Sinochem*, was wholly faithful to *Sinochem*.

3. The Court of Appeals' Fidelity to *Sinochem*.

The premises for Barrick's *Sinochem*-based argument against the Court of Appeals' decision are that the Court of Appeals was somehow obliged, by *Sinochem*, to ignore the fact that the District Court had decided the subject matter jurisdiction question before it decided the *forum non conveniens* question and also to ignore the fact that the District Court had decided it incorrectly – all in order to uphold an appallingly incorrect *forum non conveniens* decision that the District Court should never have reached or made.

Nothing in *Sinochem* supports this argument. To the contrary, because the District Court reviewed subject matter jurisdiction first, wholly consistent with *Sinochem*,[47] there was no *Sinochem* sequencing issue for the Court of Appeals to review. For the same reason, there is no anti-sequencing ruling by the Court of Appeals that this Court must now review and "cure."[48]

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[47] The Province certainly did not contest the District Court's right to review the questions before it in that order. Neither did Barrick – until after the fatal errors in the District Court's subject matter analysis had been exposed. And even then Barrick's response was not to challenge the District Court's actual decision-making sequence, but to pretend that it had never happened.

[48] Barrick asks this Court to grant certiorari in order to "make

The only issue that could be properly before this Court then is whether a Court of Appeals has the authority, post-*Sinochem*, to reverse a district court's erroneous holding that it had subject matter jurisdiction over that action. Of course, the general duty of appellate courts in such matters is well established. As this Court noted in *Steel Co.*:[9]

> [E]very federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review," even though the parties are prepared to concede it. . . . And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.

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clear that the circuit courts should also have the discretion to address *forum non conveniens* issues before jurisdictional issues." Pet. App. at 12a. However, there is nothing in this case that suggests anything to the contrary. *Sinochem* clearly provides judicial discretion to take the "less burdensome course" to dismissal in most cases, *see Sinochem*, 549 U.S. at 436, and by addressing subject matter jurisdiction first, an issue the appellate court viewed as "not particularly complex," Pet. App. at 10a, the panel properly exercised the very discretion that Barrick now asks this Court to confirm.

[9] *Steel Co.*, 523 U.S. at 1013 (internal citations omitted).

Nothing in *Sinochem* can be read to have limited that duty, or the Court of Appeals' ability to perform it. *Sinochem* simply has nothing to say about the duties of appellate courts faced, as the Court of Appeals was, with an erroneous subject matter jurisdiction decision. It is hardly surprising then that the Court of Appeals, after closely reviewing *Sinochem*, found that "*Sinochem* presents no bar to our reaching the issue of whether the Province's allegations involve federal questions."[26]

There is no credible argument to the contrary, and Barrick does not offer one, or any authority that would support such an argument. The Court of Appeals, like the District Court below, had the discretion, under *Sinochem* and numerous other of this Court's precedents, to review and decide the subject matter jurisdiction issue first, before considering any *forum non conveniens* issues. When the Court of Appeals did exercise that discretion in that manner, it acted consistently with both the letter and the spirit of *Sinochem*.

4. Barrick's Sinochem Question Does Not Merit Certiorari.

As the foregoing discussion makes very clear, nothing in the Court of Appeals' analysis or application of *Sinochem* restricted the discretion that *Sinochem* granted to lower courts faced with both a *forum non conveniens* issue and a challenge to the court's subject matter jurisdiction.

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[26] Pet. App. at 16a.

In fact, both the District Court and the Court of Appeals acted in a manner consistent with *Sinochem*, and exercised their discretion in a manner consistent with *Sinochem*, restricted only by that opinion's own limitations.

Barrick's real grievance is that those courts did not exercise that discretion in the manner it would have preferred. *Certiorari* is an inappropriate remedy for individual discontents of that sort, and Barrick's petition should be denied for that reason.

B. THE COURT OF APPEALS CORRECTLY HELD THAT THE FEDERAL COURTS DID NOT HAVE SUBJECT MATTER JURISDICTION OVER THIS MATTER.

Barrick's second argument for certiorari is premised on the notions that: (1) the circuit courts of appeals are split as to the scope of the federal common law of foreign relations; (2) the Ninth Circuit Court of Appeals comes down on the wrong side of that split because its jurisdictional test is too restrictive;[5] and (3) (implicitly) a District Court applying standards other than those in effect in the Ninth Circuit would have held that it had jurisdiction over this matter.

[5] The Barrick question presented to this court on this point is: "Does federal question jurisdiction exist based on the federal common law of foreign relations where substantial foreign policy concerns are implicated, though not expressly stated on the face of the complaint?" Pet. at i. Not surprisingly, since there are no substantial foreign policy concerns stated on the face of the Province's complaint (and the Court of Appeals so held), Barrick would answer its own question in the affirmative. Pet. at 14-25.

That argument fails for at least two reasons. First, that issue was not raised below, where Barrick relied on the act of state doctrine, not the federal common law of foreign relations, in its failed attempt to establish federal jurisdiction.[12] Because Barrick did not raise or develop a non-act of state argument below, the district court never conducted any fact-finding on whether the Province's case implicates the foreign relations between the Philippines and the United States.

Second, under any circuit's analysis of the jurisdictional implications of the federal common law of foreign relations and/or the act of state doctrine, the Court of Appeals properly dismissed this case for lack of federal subject matter jurisdiction.

I. Barrick's Newfound (And Misplaced) Reliance On The Federal Common Law Of Foreign Relations As A Basis For Subject Matter Jurisdiction.

a. The Patrickson Framework Governing This Case.

The nation's leading case regarding the jurisdictional implications of the federal common law of foreign relations and the act of state doctrine is the Ninth Circuit's decision in *Patrickson v. Dole Food*

[12] Barrick never once mentioned the "circuit split" that now purports to concern it. *See* footnote 1, *supra*.

Co.,[53] a suit by a putative class of Latin American banana workers allegedly damaged by pesticides used by the multinational fruit companies that employed them.

Though the plaintiffs asserted no federal claims in that case, the defendants and third-party defendants removed it to federal district court in Hawaii, claiming that the court had jurisdiction based on the Foreign Sovereign Immunities Act ("FSIA") and the federal common law of foreign relations. The district court rejected the former argument (asserted by two third-party defendants formerly owned indirectly by the Israeli government), but found jurisdiction under a federal common law of foreign relations theory.[54]

On appeal, the Ninth Circuit addressed both of the defendants' theories of removal jurisdiction and found that there was no jurisdiction based on the federal common law of foreign relations, and no jurisdiction under FSIA. Accordingly, the Ninth Circuit ordered the case remanded to the Hawaii state court in which it arose.

For present purposes, it is important to note three aspects of the Ninth Circuit's rejection of Dole's federal common law of foreign relations theory of jurisdiction. First, the Ninth Circuit expressed its doubts as to the validity of the theory as a basis for

[53] 251 F.3d 795 (9th Cir. 2001), *aff'd in part, dism'd in part*, 538 U.S. 468 (2003).

[54] *Patrickson v. Dole Food Company, Inc.*, Civ.No. 97-01516-HG (D. Haw. Sept 9, 1998) DE No. 153 at pp. 5-29.4

federal jurisdiction, especially in light of all the statutory law already occupying the area.[55] Second, the Ninth Circuit did recognize that cases actually founded on act of state issues *could* give rise to federal jurisdiction, if that act of state were asserted "affirmatively as the basis of a claim."[56] Third, the Court of Appeals directly addressed and distinguished

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[55] *Patrickson*, 251 F.3d at 803 (emphasis added) ("We see no reason to treat the federal common law of foreign relations any differently than other areas of federal law. Certainly federal courts have preminence in developing all areas of federal law by virtue of the fact that almost all cases premised on federal law may be brought in or removed to federal court. In addition, Congress has provided federal jurisdiction in certain cases implicating our foreign relations, regardless of the nature of the claim. *See, e.g.*, 28 U.S.C. § 1251(b)(1) (suits where ambassadors or their foreign government officials are parties); *id.* § 1351 (suits against foreign consuls or other diplomatic personnel); *id.* § 1330 (suits against a foreign state); *see also id.* § 1350 (suits brought by an alien for a tort committed in violation of international law. **What Congress has not done is to extend federal-question jurisdiction to all suits where the federal common law of foreign relations might arise as an issue. We interpret congressional silence outside these specific grants of jurisdiction as an endorsement of the well-pleaded complaint rule.").**

The Court of Appeals could also have pointed to numerous other federal jurisdictional statutes with international implications for, *inter alia*, foreign states or the citizens and subjects thereof. *See, e.g.*, 28 U.S.C. §§ 1332(a)(2)(3) & 1333; 28 U.S.C. §§ 1364 & 1368. Today, it is also likely that the Court of Appeals would point to this Court's numerous injunctions in the opinions in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) and other cases against the expansion of jurisdiction through the expansion of the federal common law.

[56] *Id.* at 806 n.2.

each of the cases from which Barrick now seeks to manufacture a "circuit split."[57]

The defendants and third-party defendants appealed the Ninth Circuit's decision to this Court separately, and this Court affirmed as to the FSIA issues. However, this Court did not address Dole's claim to jurisdiction premised on the federal common law of foreign relations for the simple reason that the Dole Defendants did not appeal it.[58] The remand order was therefore sustained, and the Ninth Circuit's detailed analysis of (and rejection of) Dole's federal common law of foreign relations claim remains the leading analysis of that theory of federal jurisdiction, as both the District Court and the Court of Appeals observed.

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[57] As to *Marcos*, *see Patrickson*, 251 F.3d at 808 n.2, 801, 802, 803. As to *Torres*, *see id.* at 801, 803, 804 nn. 8, 9. As to *Pacheco de Perez*, *see id.* at 801, 803, 804 n.9.

[58] *Dole Food Co. v. Patrickson*, 530 U.S. 468, 474 & 480 (2003) ("Addressing the ground relied upon by the Dole petitioners, [the Court of Appeals] held removal could not rest on the federal common law of foreign relations". 251 F.3d 795, 800 (CA.9 2001). In this Court, the Dole petitioners did not seek review of that portion of the Court of Appeals' ruling, and we do not address it. Accordingly, the writ of certiorari in No. 01-593 is dismissed.").

b. Barrick's Response To The Patrickson Framework: Fleeing From The Act Of State Doctrine.

The existence of the *Patrickson* decision (and of the framework set forth therein) at the time Barrick removed this case to federal court is important. *Patrickson* not only provided a very well-known backdrop to any Barrick effort to claim federal court jurisdiction over this case, it also exposed the more problematic aspects of those cases on which Barrick now seeks to rely.

In those circumstances, it is instructive to note that Barrick chose, in the courts below, to make its case for jurisdiction almost entirely within the *Patrickson* framework – by attempting to argue that there were act of state issues in the case, and that they gave rise to federal jurisdiction. Of course, Barrick failed in that effort.

However, it is just as instructive to note what Barrick did not do in the face of its failures to achieve federal court jurisdiction within the *Patrickson* framework. It did not stress or argue or even mention the view of the federal common law of foreign relations supposedly memorialized in the *Marcos*, *Torres*, and *Pacheco de Perez* decisions. And it certainly made no effort to develop a factual record that would support the argument that Barrick now tries to make: that the Province's complaint must be handled by the federal courts because this case substantially affects the sovereign interests of the Philippines.

Of course, it is easy to see why there is no factual record in this case mirroring that in *Torres*. To obtain such a record, Barrick – the polluter of the Philippines – would have had to ask the government of the Philippines for affidavits and amicus briefs protesting the U.S. courts' efforts to bring long-delayed relief to one of its own provinces, and to hundreds of thousands of its own citizens, on the ludicrous ground that this action threatened the Philippines' sovereign interests. Not surprisingly, neither the District Court nor Barrick requested any such briefing from either the Philippines or the United States Government.

2. Barrick's Assertion Of Subject Matter Jurisdiction Over This Case Would Fail In Any Circuit.

Having failed to make out its act of state argument in the Court of Appeals, because "none of the supposed acts of state identified by the District Court is essential to the Province's claims,"[59] Barrick now recasts its argument to claim that federal question jurisdiction arises because the complaint substantially affects a foreign country's sovereign interests.[60] That is so though Barrick expressly took the position in the Court of Appeals that "Defendants have never contended that a U.S. federal court should assert

[59] Pet App. at 17a. Of course, it is important to note that the Court of Appeals did not identify a single act of state issue in this case – *i.e.*, it identified no government act of a sovereign state (the Philippines) taken within its own borders, on which the trial court or the jury in this case would actually have to pass judgment.

[60] Pet. at 4.

jurisdiction over the present case simply because a foreign government has an interest in the case."[61]

To give that new argument additional cachet in this Court, Barrick also suggests, for the first time, that "[t]here is a circuit split as to whether federal question jurisdiction is met in cases having important foreign policy implications even though not raised as an essential element of a cause of action."[62] The implicit argument is that if this Court should adopt those standards alleged to be on the other side of the split, Barrick would be able to sustain its claims to federal court jurisdiction.

Of course, no discussion of such split arose below because the Ninth Circuit was not asked to decide, and did not decide, the question of the effects of the Province's complaint – substantial or otherwise – on the Philippines' sovereign interests. More to the point, Barrick – which had the entire burden of establishing subject matter jurisdiction in the lower courts – offered neither argument nor proof that the Province's complaint substantially affects the sovereign interests of the Republic of the Philippines.

The Province's well-pleaded complaint describes an action between a Philippine sovereign that has voluntarily submitted itself to the Nevada courts and two multinational mining companies operationally centered in Nevada. The Province's complaint places

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[61] Resp. App. at 10b.

[62] Pet. at 15.

Barrick and its misconduct, and not the conduct of the Philippine government, squarely at the center of the litigation. As a result, there is nothing in this case that would change if there were a genuine split between the circuits and this Court actually applied the *Marcos*, *Torres*, and *Pacheco de Perez* analyses to this case.

The *Marcos* case implicated U.S. foreign policy because a U.S court had to decide, as a necessary element of the plaintiff's case, "whether to honor the request of a foreign government . . . to freeze property in the United States subject to future process in the foreign state,"[63] as the Court of Appeals noted.[64] The Province's complaint raises no such question for a U.S. court.

The *Torres* case ostensibly implicated U.S. foreign policy because the Peruvian government had protested the lawsuit by filing a letter with the U.S. State Department and by submitting an amicus brief to the Fifth Circuit[65] and because the case concerned a "critical" industry within the Peruvian economy, which contributed up to 50% of its export income and 11% of its gross domestic product.[66]

Here, the Philippine national government has not protested this lawsuit by filing a letter with the

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[63] 806 F.2d at 354.

[64] 582 F.3d at 1091 n.7.

[65] 113 F.3d at 542.

[66] *Id.* at 543.

U.S. State Department or filing an amicus brief with the Court of Appeals, and there is no evidence in the record regarding the role of the mining industry in the Philippine economy or regarding its particular contributions to export income or gross domestic product. Thus, even if *Torres* was good law,[67] and was applied here, the outcome would be no different.

Then there is the *Pacheco de Perez* case, in which the Eleventh Circuit Court of Appeals *rejected* AT&T's efforts to establish jurisdiction based upon a *Torres*-like[68] view of the federal common law of foreign relations. It did so because of the paucity of any record supporting AT&T's argument that its liability directly implicated Venezuela's sovereign rights. Barrick likewise would wholly fail to establish that proposition.

The most important distinguishing fact of the case at bar compared to all of the above cases is that the Province is **a Philippine sovereign state that brings this action, and that fact is hardly likely to occasion a protest from the Philippine government – let alone affidavits, letters, and amicus briefs memorializing that protest**. Without the foreign sovereign insisting that a United States court's

[67] There is some question as to whether *Torres* is even good law in the Fifth Circuit. *See Al Qasim Obied Ibrahim Mohammad v. Airbus, S.A.S.*, No. 09 cv 1817, 2009 WL 3807090, at *3 (N.D. Ill. Nov. 10, 2009).

[68] It is not at all clear, as Barrick suggests, that the Eleventh Circuit has adopted *Torres*' view of the issue. All that is clear is that AT&T had proposed and argued that view, and that the Eleventh Circuit found that AT&T fell far short of even AT&T's preferred jurisdictional standard.

jurisdiction over a case will implicate its foreign relations, Barrick could not have prevailed in obtaining subject matter jurisdiction in this case even if its new alternative theory was the law of the land.

C. THERE ARE NO "COMPELLING REASONS" FOR GRANTING THE WRIT OF CERTIORARI IN THIS CASE.

This Court's rules counsel every petitioner seeking certiorari that the petition "will be granted only for compelling reasons,"[69] and that the petitioner's argument in support of its petition must be made in those terms.[70] It is not surprising then that Barrick has attempted to couch its general discontents with the Ninth Circuit's rulings in the language of Supreme Court Rule 10.

What is surprising is that Barrick has done so by: (1) alleging that the Court of Appeals has affronted a Supreme Court decision (*Sinochem*); and (2) claiming that there is a split of authority relevant to this case regarding the scope of the federal common law of foreign relations at the Circuit Court level. As the foregoing shows, there is no basis for either claim.

The first claim is based on a studious re-writing of the facts and the law. The second is based, first, on a determined effort to ignore the record below and, second, on the rewriting of the relevant case law. As a

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[69] *See* Supreme Court Rule 10.

[70] *Id.* at Rule 14.1(h).

result, it could not be clearer that there is no infidelity to *Sinochem* whatsoever, and that the alleged circuit split is either non-existent or, if it exists at all, irrelevant to this case and its outcome.

CONCLUSION

Because both of Barrick's arguments are contrived, and factually and legally flawed, neither offers a compelling reason for the grant of certiorari in this case. This Court should deny the petition.

Respectfully submitted,

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2:05-CV-1299-BES-RJJ
UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

PROVINCIAL GOVERNMENT OF MARINDUQUE
Plaintiff,
v.
PLACER DOME, INC., Defendant.

ORDER

Currently before the Court is Plaintiff's Motion for Order Requiring Defendant to Show Cause Why This Action Should Not Be Remanded to State Court (#94), which was filed on March 17, 2006. Defendant filed a Response (#105) on April 4, 2006, and Plaintiff filed a Reply (#114) on April 19, 2006.

I. BACKGROUND

This matter arose from mining activities that occurred between 1964 and 1997 on the island of Marinduque, a small island province of the Philippines. The Court now recounts Plaintiff's allegations regarding these mining activities.

In the early 1950's, Placer Development began exploring, mapping, and drilling on Marinduque to determine the extent of natural mineral resources on the island. By 1956, Placer Development identified substantial amounts of copper on the slopes of Mount Taipan in Marinduque's north central highlands. This mining site, however, was located on a forest reserve, which was protected by Presidential proclamation. To sidestep this protection, Placer Development entered

into a secret agreement with Ferdinand Marcos, the newly elected President of the Philippines. Under this agreement, Placer Development gave Marcos a personal ownership interest in its subsidiary, Marcopper Mining Corporation ("Marcopper"), a Philippine corporation created solely to extract the copper and gold beneath the forest reserve.[1] In return, Marcos withdrew the forest reserve's protected status, thereby allowing Marcopper to commence mining.

Between 1964 and 1987, Placer Development, through its wholly owned subsidiary, Placer Copper Holdings ("Placer Copper"), controlled 39.9 percent of Marcopper's shares.[2] In 1987, Placer Development then merged with two other Canadian mining companies to form Defendant. After the merger, Defendant retained the 39.9 percent ownership interest in Marcopper. Through this ownership interest, Placer Development and, subsequently, Defendant were able to completely dominate Marcopper, making all of the managerial decisions regarding mining on Marinduque.

These managerial decisions included the decision to open the Tapian Pit in 1969. To facilitate mining at the Tapian Pit, Defendant constructed a drainage tunnel leading to the Boac River. This drainage tunnel transported acidic rainwater to the river, resulting in the desecration of flora, fauna, and fish stocks in the river. Further, Defendant transported toxic mine tailings from the Tapian Pit to the Calancan Bay.

The Calancan Bay is a natural bay that covers a 27 square mile area at the north end of Marinduque. In 1974, Defendant, on Marcopper's behalf, applied to the National Water and Air Pollution Control Commission

("NWAPCC") for a permit to dump the Taipan Pit tailings into the bay. Defendant's partner, Marcos, ordered the NWAPCC to grant the permit. Although this permit only allowed Defendant to dispose of the tailings deep beneath the surface of the bay, Defendant began surface dumping, which caused substantial harm to the bay, its marine life, and the citizens of Marinduque.

In 1991, Defendant exhausted the ore supply in the Taipan Pit. That same year, Defendant opened the San Antonio Pit to continue mining in Marinduque. After mining commenced in the San Antonio Pit, toxic silt, a byproduct of the mining process, began to erode from the pit into the Mogpog River. To remedy this problem, Defendant constructed the Maguila-Guila Dam to trap the toxic silt before it infested the waters of the Mogpog River. The dam, however, was insufficient to contain all of the silt and the downstream wildlife continued to be affected.

In 1993, The Maguila-Guila Dam collapsed, causing a wall of toxic silt to rush into the Mogpog River. The flooding that resulted destroyed homes and rice fields and killed animals and two children. To prevent future flooding, Defendant reconstructed the dam with an overflow hole that relieves pressure during periods of heavy rainfall. This overflow hole, however, allows toxic silt to flow into the Mogpog River, causing further harm to Marinduque's environment.

Because of the foregoing damage that the Marinduque mining operations have caused, Plaintiff filed a Complaint against Defendant in the District Court of Clark County Nevada. In this Complaint, Plaintiff

alleges the following thirteen causes of action against Defendant; (1) Enforcing the Public Trust; (2) Violations of the Philippine Revised Penal Code; (3) Violations of the Philippine Revised Penal Code; (4) Violations of the Philippine Water Code; (5) Violations of the Philippine Fisheries Decree of 1975; (6) Violations of the Philippine National Pollution Control Decree of 1976; (7) violations of the Philippine National Water and Air Pollution Control Commission Act; (8) Violations of the Philippine Mining Act of 1995; (9) Negligence; (10) Public and Private Nuisance; (11) Breach of Contract (first count); (12) Breach of Contract (second count); and (13) Promissory Estoppel.[3] Defendant removed this action on October 27, 2005. The Court now determines whether it has jurisdiction over this case.

II. ANALYSIS

Federal courts are courts of limited jurisdiction. Section 1441 (a) provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction maybe removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441 (a) (2005). Jurisdiction in this case is premised upon a federal question under 28 U.S.C. § 1331. Federal courts may not assert federal question jurisdiction over an action unless a federal right or immunity is "an element and an essential one, of the plaintiff's cause of action." See e. g., Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 11 (1983). This well-pleaded complaint rule requires that the federal question on which jurisdiction is premised "be disclosed

upon the face of the complaint, unaided by the answer." Phillips Petroleum Co. v. Texaco Inc., 415 U.S.125,127-28 (1974).

Under Section 1447(c), a district court is required to remand an action "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction . . . ." 28 U.S.C. § 1447(c) (2005). This statute is strictly construed against removal jurisdiction and doubts as to the right of removal are resolved in favor of remanding the case to state court. Gaus v. Miles,_ Inc., 980 F.2d 564, 566 (9th Cir.1992); Matheson v. Progressive Specialty Ins. Co., 319 F.3d 1089, 1090 (9th Cir.2003). Because of the strong presumption against removal jurisdiction, a removing defendant bears the burden of proving, by a preponderance of the evidence, that the Court has subject matter jurisdiction over the removed action. Gaus, 980 F.2d at 566; Sanchez v. Monumental Life Ins. Co., 102 F.3d 398, 403-04 (9th Cir.1996).

In its Notice of Removal (#1), Defendant asserts that this Court has original jurisdiction over this action under 28 U.S.C. § 1331 because the action involves federal common law, including questions of international law and foreign relations.

Although there is no general federal common law, the Supreme Court has recognized that "there are enclaves of federal judge-made law which bind the States." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964). One such enclave concerns the law of international affairs and foreign relations. As the Supreme Court noted in Sabbatino, "rules of international law should not be left to divergent and

perhaps parochial state interpretations." Id. at 425. A specific example of this is the longstanding act of state doctrine, which precludes U.S. Courts from questioning the validity of actions that a foreign government takes within its own borders. Underhill v. Hernandez,168 U.S. 250, 252 (1897). "Whether a foreign state's act is given legal force in the courts of the United States is a 'uniquely federal' question directly implicating our nation's foreign affairs." Patrickson v. Dale Food Co., 251 F.3d 795, 799 (9th Cir. 2001).

Although Sabbatino resolved a choice of law issue regarding whether state or federal law applies to international law cases, the opinion is also helpful in determining whether the Court has federal-question jurisdiction over this matter. As the Ninth Circuit reasoned, "Sabbatino held that the common law of foreign relations falls outside Erie's general rule and so federal law applies. Federal common law is, of course, federal law; so if a plaintiff's claim arises under the federal common law recognized by Sabbatino, the federal courts will have jurisdiction under 28 U.S.C. § 1331." Patrickson, 251 F.3d at 800 (internal citations omitted).

The Ninth Circuit has previously applied Sabbatino to determine whether a federal court could assert federal question jurisdiction over such claims based on the federal common law of foreign relations. Patrickson, 251 F.3d at 798. Patrickson involved a class action brought by Latin American banana workers against multinational fruit and chemical companies alleged to have exposed workers to a toxic pesticide. The Ninth Circuit ultimately held that it could not assert federal question jurisdiction in that case because "nothing in

plaintiffs' complaint turn[ed] on the validity or invalidity of any act of a foreign state." Patrickson, 251 F.3d at 800. Further, the Ninth Circuit noted that "[p]laintiffs [did not] claim that any foreign government participated in such activities or that the defendants acted under the color of foreign law. The case-at least as framed by plaintiffs--- [did not] require [the court] to evaluate any act of state or apply any principal of international law." Id.

Essential to the Ninth Circuit's holding in Patrickson was the fact that the plaintiffs did not make any allegations in their complaint that would invoke the act of state doctrine. In fact, this is the issue on which the Ninth Circuit departed from its sister circuits' holdings. For example, in Republic of Philippines v. Marcos, 806 F.2d 344 (2d. Cir. 1986), the Second Circuit suggested that federal question jurisdiction could be premised on the fact that a case may affect foreign relations regardless of whether federal law is raised by the plaintiff's complaint. Id. at 354. The Ninth Circuit rejected this proposition, explaining that Sabbatino created an exception only to Erie, and not to the well-pleaded complaint rule. Patrickson, 251 F.3d at 801-02. Thus, under Sabbatino and Patrickson, the Court must determine that the allegations in Plaintiff's Complaint require the Court to evaluate any act of state or apply any principal of international law before it can assert jurisdiction.[4]

In its Complaint, Plaintiff alleges numerous actions taken by the Philippine government to facilitate Defendant's alleged desecration of its environment. First, Plaintiff alleges that the ex-president of the Philippines, Ferdinand Marcos, overturned a

Presidential Proclamation, allowing Defendant to commence mining beneath Marinduque's forest reserve. (Original Complaint (attached to Defendant's Notice of Removal (#1)) at Par. 40-41). Second, Plaintiff alleges that Marcos and, subsequently, the Presidential Commission on Good Government owned 49 percent of the shares of Marcopper, Defendant's subsidiary mining company in Marinduque. Id. at Par. 42.Third, Plaintiff alleges that Marcos ordered the NWAPCC to issue permits that allowed Defendant to dump toxic waste into the Calancan Bay. Id. at Par. 65. Fourth, Plaintiff alleges that when the NWAPCC later attempted to restrict the amount of dumping into Calancan Bay, Marcos removed the constraints and ordered the NWAPCC to never again impose restrictions on Defendant's ability to dump mine tailings into the Calancan Bay. Id. at Par. 154. Finally, Plaintiff alleges that in 1988, after Marcos was overthrown, the Pollution Adjudication Board ("PAB"), a Philippine government agency, ordered Defendant to cease and desist its dumping into Calancan Bay. Defendant sought to undermine this order by appealing to the newly elected Philippine President, Corazon Aquino. Aquino ultimately complied with Defendant's request and enjoined the PAB from enforcing its cease and desist order. Id. at 158-162. Thus, Plaintiff's Complaint is replete with allegations regarding the Philippine Government's activities, which contributed to the environmental harm that Plaintiff has suffered.

Because the allegations in Plaintiff's Complaint require this Court to evaluate the acts of a foreign state, this Court has federal question jurisdiction over this action. See Patrickson, 251 F.3d at 800.

III. CONCLUSION

Based on the foregoing,

IT IS HEREBY ORDERED that Plaintiff's Motion for Order Requiring Defendant to Show Cause Why This Action Should Not Be Remanded to State Court (#94) is denied.

DATED: This 6th day of November, 2006.

Footnotes

1 In 1986, after Marcos was overthrown, the Presidential Commission on Good Government seized his Marcopper shares, and Marcopper continued its mining operations in Marinduque.

2 This percentage of shares was the maximum that a foreign investor may own in a Philippine mining corporation.

3 Since this case was removed, Plaintiff has twice amended its original Complaint to add additional facts and alter its causes of actions. For purposes of determining whether removal is proper, however, the Court analyzes jurisdiction on the basis of the pleadings filed at the time of removal without reference to subsequent amendments. See e.g,, Sparta Surgical Corp. v, NASD, 159 F.3d 1209, 1213 (9th Cir. 1998).

4 As the Ninth Circuit has noted, "[a]l though the act of state doctrine generally serves as a defense, it can also be used affirmatively as the basis of a claim." Patrickson, 251 F.3d at 800 n.2.

Excerpt from Placer Dome Inc. and Barrick Gold Corporation's Response Brief filed in the Ninth Circuit

In short, after the Supreme Court decided Sinochem, the district court never waivered from its view that it could dismiss this case on forum on conveniens without deciding subject matter jurisdiction. [p.52]

Defendants have never contended that a U.S. federal court should assert jurisdiction over the present case simply because a foreign government has an interest in the case.[p.58]

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No. 09-944

Supreme Court, U.S.
FILED
SEP 3 - 2010
OFFICE OF THE CLERK

In the Supreme Court of the United States

PLACER DOME, INC. AND BARRICK GOLD CORPORATION,

Petitioners,

v.

PROVINCIAL GOVERNMENT OF MARINDUQUE,

Respondent.

ON PETTTION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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September 3, 2010

TABLE OF AUTHORITIES

CASES

Animal Science Products v. China National Metals & Minerals Import & Export Corp., Civ. No. 05-4376 (GEB), 2010 U.S. Dist. LEXIS 35243 (D.N.J. Apr. 1, 2010); 5

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) 2, 3

Patrickson v. Dole Food Co., 251 F.3d 795 (9th Cir. 2001), aff'd in part on other grounds, cert. dismissed in part, 538 U.S. 468 (2003) 2, 4

Pearson v. Callahan, 129 S. Ct. 808 (2009) 6

In re Potash Antitrust Litigation, 686 F. Supp. 2d 816 (N.D. Ill. 2010) 6

Republic of Austria v. Altmann, 541 U.S. 677 (2004) 3

Resco Products v. Bosai Minerals Group Co., Civil Action No. 06-235, 2010 U.S. Dist. LEXIS 54949 (W.D. Pa. June 4, 2010) 6

Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574 (1999) 7

Samantar v. Yousuf, 130 S. Ct. 2278 (2010) 6

Sinochem International Co. v. Malaysia International Shipping Corp., 549 U.S. 422 (2007) 6, 7

This supplemental brief is submitted in response to the Brief For The United States As Amicus Curiae. Even as it suggests that certiorari be denied, the government's amicus brief illustrates some of the strong reasons favoring this Court's review. Principal among them, the government recognizes that a circuit conflict does, in fact, exist on the standard for assessing federal subject matter jurisdiction under the rubric of the Act of State doctrine or the federal common law of foreign relations. The government's reasons for opposing certiorari notwithstanding that circuit conflict can be answered briefly.

1. Because the issue touches on sensitive aspects of our nation's relations with foreign governments, the legal principle on which the circuits are split is inherently important. In focusing instead on whether *this case* is sufficiently important (U.S. Am. Br. 9-10), the government misses a critical point. There should be no need to debate the relative significance of this case. The dispositive question at this juncture is: why wait for another case involving monumentally important foreign relations issues to wend its way to this Court: why subject another foreign government to the vagaries of litigation in United States courts on critical, vital issues of foreign relations before defining the reach of federal jurisdiction? Better to provide an answer now, so that the courts will have proper guidance at the outset to deal with another case that the government might regard as more consequential.

2. In referring throughout its brief to the Act of State doctrine, the government misses another pivotal aspect of this case. As the petition and reply brief explain, federal courts have conferred upon the term "Act of State doctrine" a definition that, by its very vagueness and opacity, engenders confusion. Originally crafted as a doctrine of defense employed to defeat jurisdiction, "Act of State" has been transported into a wholly different context as a potential basis for conferring federal jurisdiction. *See* Pet. 14-23; Reply Br. 9-11. And it is the Ninth Circuit that stands at the forefront of judicial efforts to employ "Act of State" terminology as a jurisdiction-conferring principle. *Patrickson v. Dole Food Co.*, 251 F.3d 795 (9th Cir. 2001), aff'd in part on other grounds, cert. dismissed in part, 538 U.S. 468 (2003). But, as this case illustrates, the analysis becomes wholly circular when the same standard is used to establish so-called "Act of State" jurisdiction and to defeat jurisdiction with the "Act of State" doctrine as a defense.

For that reason, resolution by this Court would provide vitally needed clarity. By employing the more precise nomenclature of "federal common law of foreign relations" to denote the jurisdiction-conferring principle, the "Act of State" doctrine could be restored to its original meaning – a prudential basis for abstaining from exercising jurisdiction when the legality of acts taken by foreign sovereigns within their own territory are challenged in a United States court. *See e.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964) ("The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity

of the public acts a recognized foreign sovereign power committed within its own territory"); *Republic of Austria v. Altmann*, 541 U.S. 677, 700 (2004) ("Under th[e act of state] doctrine, the courts of one state will not question the validity of public acts (acts *jure imperii*) performed by other sovereigns within their own borders, even when such courts have jurisdiction over a controversy in which one of the litigants has standing to challenge those acts").

3. The confusion generated by the term "Act of State" in the jurisdiction-conferring context is exemplified by the government's contention that petitioners did not raise the federal common law of foreign relations basis for jurisdiction in the Ninth Circuit. To make this point, the government quotes a heading from petitioner's Ninth Circuit brief. U.S. Am. Br. 12 n. 4 ("In The Alternative, The District Court Had Subject Matter Jurisdiction Under The Act Of State Doctrine"). But, the substantive discussion under that heading spoke expressly about the federal common law of foreign relations.[1] *See* Placer Dome Br. (CA9) at 53-54: "Under that doctrine, evaluations of the acts of foreign governments implicate the federal common law of foreign relations, giving rise to federal question jurisdiction, and are made exclusively by federal courts. *See Sabbatino*, 376 U.S. at 425 (law of international affairs and foreign relations 'should not

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[1] Moreover, the very first sentence of the brief stated: "The district court had jurisdiction under 28 U.S.C. §1331 based on the federal common law of foreign relations." *Id.* at 1.

be left to divergent and perhaps parochial state interpretations'); *Patrickson*, 251 F.3d at 799 ('Whether a foreign state's act is given legal force in the courts of the United States is a "uniquely federal" question directly implicating our nation's foreign affairs')."

It should come as no surprise that, in the course of discussing *Patrickson* in a Ninth Circuit brief, a party refers to the "Act of State" doctrine. The reason is simple: that is the terminology *Patrickson* employs in addressing an affirmative basis for creating jurisdiction. The Ninth Circuit's word choice – which informed its substantive decision in this case – goes directly to the underlying problem that the petition `asks this Court to solve.

4. The government also highlights the peculiarities of the "Act of State" nomenclature in the jurisdiction-conferring context when it cites, as a reason for denying certiorari, the absence of expressions of interest in the case by a foreign government. But, the plaintiff *is* a foreign government. Indeed, it is a foreign government suing *in its sovereign capacity* (Pet. App. 117a) to enforce its foreign law for events alleged to have occurred within its sovereign territory. And, it seeks injunctive relief to be implemented entirely within its sovereign territory. To say that more is required to establish a foreign relations (or "Act of State") nexus for jurisdiction is to miss the point entirely.

In any event, if more were needed, the record in this case would certainly suffice: in its district court filings, respondent, a foreign government, repeatedly acknowledged that there is indeed a valid

basis for federal jurisdiction because its complaint implicates United States foreign relations.[2] Under the standards applied in the Second, Fifth and Eleventh Circuits, the foreign government's complaint in this case plainly satisfies the requisites for federal subject matter jurisdiction. Accordingly, there is a conflict that this Court should resolve. Indeed, there is even greater need for review now than when the petition was filed. As several recent decisions reflect, the lower courts continue to be mired in the confusion generated by the vague boundaries between the multiple jurisdictional rubrics involved in this case. *See, e.g., Animal Sci. Prods. v. China Nat'l Metals & Minerals Imp. & Exp. Corp.*, Civ. No. 05-4376 (GEB), 2010 U.S. Dist. LEXIS 35243, at *193-204, *295-298 (D.N.J. Apr. 1,

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[2] *See, e.g.*, Pet. App. 94a ("The question now for this Court is whether Placer Dome's rearticulation of its claim to 'foreign relations' subject matter jurisdiction has met its burdens, and overcome the statutory and Ninth Circuit presumptions against removal, by establishing that the dispute articulated in the Province's well-pleaded complaint so implicates our relations with foreign nations that this Court had subject matter jurisdiction over this action as of the time the complaint was filed.

"Has Placer Dome now met those burdens?

"Yes and No.

"Placer Dome does hit on some good points: (1) that this Court could be obliged to consider some aspects of Filipino regulation of the Philippine natural environment; (2) that the case involves the actions of former President Marcos; and (3) that the remedies at issue could have foreign relations implications"). *Id.* at 97a ("The bottom line is that this Court can find ... grounds to keep or remand this case") (emphasis in original).

2010); *Resco Prods. v. Bosai Minerals Group Co.*, Civil Action No. 06-235, 2010 U.S. Dist. LEXIS 54949, at *8-10, *18-21 (W.D. Pa. June 4, 2010); *In re Potash Antitrust Litig.*, 686 F. Supp. 2d 816, 824-825 (N.D. Ill. 2010). *See also Samantar v. Yousuf*, 130 S. Ct. 2278, 2290-2291 (2010).

5. With respect to the sequencing of issues under *Sinochem Int'l Co. v. Malay. Int'l Shipping Co.*, 549 U.S. 422 (2007), the government's amicus brief says not a word about the discretion vested in the court of appeals to chart the most efficient course to an obviously correct *forum non conveniens* dismissal. But *Pearson v. Callahan*, 129 S. Ct. 808 (2009), explicitly confers discretion on the court of appeals to conserve scarce judicial resources. In this case, there should have been no impediment in the court of appeals to proceeding directly to the *forum non conveniens* analysis on which the district court based its dismissal of the complaint.

Nor does the government address the standard for circuit court review of a district court's sequencing of issues. The basis for the Ninth Circuit's decision to adjudicate subject matter jurisdiction first was its view that the issue was "not particularly complex." Pet. App. 10a. The petition and reply brief explain why that facile assessment is incorrect. Pet. 11-14; Reply Br. 5-8. Even respondent conceded that judicial determination of subject matter jurisdiction was complex, time-consuming and difficult. *See, e.g.*, Plaintiff's Motion for Order to Show Cause Why This Action Should Not be Remanded to State Court, filed March 17, 2006 (9th Cir. Excerpt of Record, Vol. 11 at 2185): "[The

Province] filed this action in Nevada state court, a court of general jurisdiction, to avoid any time and money-wasting controversies over whether this action, as of the time of its filing, could also be made to fit within the much more limited jurisdiction of the federal courts."

Of course, the key practical teaching of *Sinochem, Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999), and *Pearson* is that there is an available means to avoid the inefficient proliferation of proceedings that the Ninth Circuit required when it returned this case to state court. Even now, the state court is in the process of replowing the *forum non conveniens* ground that the federal district court had decided correctly.

In the final analysis, this case presents an opportunity for this Court to resolve an important issue of subject matter jurisdiction on which the circuits are in conflict, and a prudential issue of efficient judicial administration on which a pressing need exists for guidance to federal trial and appellate courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 09-944

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In the Supreme Court of the United States

PLACER DOME, INC. AND BARRICK GOLD CORPORATION,

Petitioners,

v.

PROVINCIAL GOVERNMENT OF MARINDUQUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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INTRODUCTORY STATEMENT

As the petition sets forth, this case presents two recurring questions of great practical significance on which the federal judiciary sorely needs this Court's guidance. Respondent's opposition merely underscores the urgency and importance of this Court's review. On the one hand, respondent contends that the critical issue of subject matter jurisdiction in this case – the federal common law of foreign relations – was not decided by either the district court or the court of appeals and, moreover, that the district court "conducted none of the necessary fact-finding to establish jurisdiction on that basis." Br. in Opp. at 1-2. *See also id.* at 8, 27. On the other hand, respondent contends that the sequencing of issues permitted by *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422 (2007) – *forum non conveniens* before subject matter jurisdiction – is not even implicated here because both lower courts ruled on subject matter jurisdiction. Br. in Opp. at 1. That internal inconsistency in respondent's argument permeates the entire brief in opposition, which, ultimately, offers no justifiable basis for denying certiorari.

I. RESPONDENT CANNOT RECAST THE FUNDAMENTAL NATURE OF THE CASE

At the outset, the Court should be mindful of respondent's rhetorical legerdemain that seeks to recast the case as something that it is not. At no point in its opposition brief does the Provincial Government ever identify the mine operator and

alleged tortfeasor by name – *i.e.*, Marcopper Mining Company. To do so, of course, would highlight the undisputed fact that the mining company whose conduct is challenged was a Philippine entity owned in largest part either by Philippine government officials or agencies. Pet. App. 122a.

Also missing from the brief in opposition is the word "Canada," even though petitioner Placer Dome, Inc. was a Canadian company headquartered in Canada and continued to be a Canadian company when it was amalgamated with petitioner Barrick.[1] Instead, respondent refers to Nevada as "the operational center of Barrick's worldwide operations" (Br. in Opp. at 4) – an assertion that is incorrect, unsupported by the record, and wholly irrelevant to the issues presented in the petition. *Cf. Hertz Corp. v. Friend*, No. 08-1107 (U.S. Feb. 23, 2010).

Respondent's creative wordsmithing cannot transform the essential nature of this case: a lawsuit by a provincial government of the Republic of the Philippines that challenges actions by a Philippine company (Marcopper) in which, at all relevant times, the largest shareholder was either the President of

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[1] Respondent refers briefly to petitioners' "remarkabl[e]" argument in the lower courts for dismissal under *forum non conveniens* in favor of a British Columbia forum. Br. in Opp. at 6-7. The suggestion of a Canadian forum could be considered remarkable only if one ignores, as respondent does, that Placer Dome was a Canadian company that amalgamated with "old" Barrick Gold Corporation to form another Canadian company – *i.e.*, "new" Barrick Gold Corporation. Pet. App. 25a.

the Philippines[2] or the Philippine Commission on Good Government. Pet. App. 94a.

In short, this case is principally an internal dispute between different levels of the Philippine government. The underlying claims, therefore, directly implicate delicate issues of foreign relations. Indeed, the case has the potential to entangle the judiciary of this country in disputes over regulatory and policy decisions made by the federal government of the Philippines concerning the extraction of natural resources that were unpopular with provincial governments of the Philippines. Under settled principles, subject matter jurisdiction to

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[2] Marcopper was owned and managed by a number of presidential administrations. The complaint expressly challenges actions of the Philippines government under the administrations of Presidents Ferdinand Marcos (1965-1986), Corazon Aquino (1986-1992), and Fidel Ramos (1992-1998). The complaint alleges that Marcopper was involved in destructive mining activities in the Province of Marinduque from 1964 to 1997, thus extending long after Marcos' departure. Pet. App. 114a-115a. Two of the three environmental disasters alleged in the complaint – the 1993 Maguila-Guila Dam collapse and the 1996 Boac River tailings plug collapse, which the brief in opposition (at 3) labels the "most cataclysmic" – occurred when President Ramos was in power many years after President Marcos had been removed. Moreover, the operating permits that the complaint challenges were renewed annually by the national government and attempts to revoke those government-issued permits were rebuffed by the Aquino administration. Pet. App. 128a, 129a.

decide whether the case should proceed rests in a United States district court rather than a state court.

Another inherent foreign relations aspect of the case is whether the United States, through its courts, should prescribe rules of conduct and liability under foreign law for Canadian companies that invest in non-U.S. entities. In this regard, the Court must be mindful of the fact that petitioner Placer Dome was merely a minority shareholder of the Marcopper company. Indeed, Philippine law strictly limited the extent of non-Philippine ownership. Pet. App. 122a.

By their very nature, the Provincial Government's claims as alleged in the complaint raise foreign relations issues posing complex questions of subject matter jurisdiction of the type that *Sinochem* contemplated. In reversing the district court's decision that *forum non conveniens* was the appropriate basis for disposition of this case, the Ninth Circuit drastically curtailed the discretion that *Sinochem* expressly provided. Certiorari is warranted to ensure the maintenance of a proper balance between trial and appellate courts in their exercise of sound discretion.

II. UNDER ANY VIEW OF THE RECORD, SIGNIFICANT QUESTIONS MERIT THIS COURT'S ATTENTION

The nuances and complexities in the procedural history of this case serve only to broaden the potential impact of a decision by this Court. To be sure, the timing of this Court's decision in

Sinochem affected the timing and sequencing of the district court's decision-making process. The district court's initial, pre-*Sinochem* decision to deny remand to state court noted that subject matter jurisdiction existed under the Act of State doctrine. Pet. App. 8a.

Having found a basis for federal jurisdiction, the district court did not address the additional grounds upon which petitioners asserted removal jurisdiction in federal court.[3] Accordingly, as the Provincial Government repeatedly asserts in opposing certiorari, the district court never engaged in the complex fact-finding necessary to rule on the existence of jurisdiction under the federal common law of foreign relations. Br. in Opp. at 1, 2, 7 n.10, 8, 27, and 31. Nor did the district court address the further complexities of ascertaining personal jurisdiction. *Id.* at 8.

Rather, once *Sinochem* was decided, the district court immediately recognized the wisdom of this Court's guidance, stayed all discovery on personal jurisdiction, and moved directly to consider *forum non conveniens* as a basis for dismissal.[4] ER 1547. In opting for that sequence of issues, the district court expressly relied upon the discretion afforded by *Sinochem*. *Id.*

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[3] *See* Ninth Circuit Excerpt of Record ("ER") at 2094, 2095, 2098, 2104-15, 2855, 3019.

[4] Barrick did not "drop[] its personal jurisdiction motion in favor of a new motion", as the Province incorrectly asserts. Br. in Opp. at 6-7. Rather, the district court stayed the issue of personal jurisdiction. ER 1547.

Under any view of the district court proceedings, this case presents important questions regarding the proper application of *Sinochem* by federal trial and appellate courts. Consider the possible scenarios:

- If, as petitioners contend, the district court eventually concluded that it could reach *forum non conveniens* without resolving all aspects of subject matter jurisdiction, then this case presents a straightforward application of *Sinochem*. The Ninth Circuit's reversal precipitously restricts the very discretion that this Court conferred upon district courts to use the most efficient, expeditious sequencing in each case. That determination necessarily raises important questions regarding the scope of appellate review over *Sinochem* discretion.[5]

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[5] There is no merit to respondent's contention that any discussion of subject matter jurisdiction in *Sinochem* was merely *dicta*. Br. in Opp. at 19 n.41. This Court granted review in *Sinochem* specifically for the purpose of determining "whether *forum non conveniens* can be decided prior to matters of jurisdiction." 549 U.S. at 428-29. The Court held that, "where subject-matter or personal jurisdiction is difficult to determine, and forum non conveniens considerations weigh heavily in favor of dismissal, the court properly takes the less burdensome course." *Id.* at 436. This cannot be read as *dicta* because it is both the answer to the question the Court was reviewing and the essence of the Court's decision. In any event, if the references in *Sinochem* to subject matter jurisdiction were *dicta*, there would be even more reason to grant certiorari in this case so that this Court could definitively resolve the question.

- If, as the Provincial Government contends and the Ninth Circuit concluded, the district court decided at least some aspects of subject matter jurisdiction, then the case presents additional vital questions of the proper scope of review. Does the appellate court have free rein to decide issues of subject matter jurisdiction that the district court, relying on *Sinochem,* chose not to consider? More specifically, is the appellate court empowered to resolve aspects of jurisdictional questions on which the district court, to use respondent's description, "conducted none of the necessary fact-finding"? Br. in Opp. at 1. And, what standard governs the appellate court's analysis of the question whether the district court should have decided all potential bases for subject matter jurisdiction? Does the appellate court itself have discretion to employ a different sequence?

On this last point, *Pearson v. Callahan,* 129 S. Ct 808 (2009) is informative, since it conferred discretion on both the district court and the court of appeals to decide the appropriate decisional sequence. Accordingly, the interplay of those two separate exercises of discretion poses compelling questions regarding the scope of review that this Court should decide.

In any event, a fundamental question remains that this Court should resolve: Under what circumstances may the appellate court proceed to decide *forum non conveniens* first, even if the district court did not proceed in that manner? Here, the Ninth Circuit did not attempt to utilize the appellate discretion this Court described in *Pearson.*

The operational point is simple. In a case in which the clearly correct path is to dismiss on grounds of *forum non conveniens* in favor of the available adequate forum proposed by petitioners, the district court chose the most efficient, expeditious course available at the time of decision. Contrary to the holding in *Sinochem* and the principles also articulated in *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999) and *Pearson*, the Ninth Circuit charted a more circuitous, laborious and time-consuming course. This Court's review is fully warranted to ensure that the lower courts can achieve the salutary objectives that informed *Sinochem*, *Ruhrgas*, and *Pearson*.

III. THE EXISTING SPLIT AMONG THE CIRCUITS SHOULD BE RESOLVED

The Provincial Government's opposition to certiorari on the issue of using the common law of foreign relations as a basis for subject matter jurisdiction is entirely incorrect. First, and contrary to respondent's contention, the assertion of a split in the circuits on this issue is not a late-breaking development conjured up only for purposes of certiorari. It is the strongest type of circuit conflict: one explicitly recognized by the court of appeals. The Ninth Circuit's decision in *Patrickson* addresses the conflict, expressly disagreeing with the decisions of the Second, Fifth and Eleventh Circuits. *Patrickson v. Dole Food Co.*, 251 F.3d 795, 800-03 (9th Cir. 2001). Accordingly, the conflict that petitioners raise in this Court was well known to the Ninth Circuit. Of course, since this case was litigated in the Ninth Circuit, attention in the lower courts naturally

focused on Ninth Circuit precedent rather than on the decisions of other appellate courts with which the Ninth Circuit had already disagreed.

Second, again contrary to respondent's contention, the federal common law of foreign relations was consistently and repeatedly asserted as a basis for federal jurisdiction in both the district court and the court of appeals. *See* note 3, *supra*.[6] As is evident from the decision below, however, there is considerable disagreement and confusion in the federal courts over two concepts: the Act of State doctrine and the federal common law of foreign relations. Although both implicate some similar concerns, there are differences.

The Act of State doctrine is typically employed as a basis for defeating federal jurisdiction. Thus, cases decided under that rubric often turn on justiciability questions regarding the authority of a United States court to sit in judgment of acts taken by sovereign governments within their own territory. *See e.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416 (1964) (applying act of state doctrine in a financial dispute involving the nationalization of a sugar company in Cuba).

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[6] The basis for federal jurisdiction was also discussed at length in petitioners' brief to the Ninth Circuit on appeal. *See* Brief of Appellees at 53-60, *Provincial Gov't of Marinduque v. Placer Dome, Inc.*, No. 07-16306 (9th Cir. Sept. 15, 2008).

Confusion can easily ensue when Act of State terminology is employed as a basis for establishing federal subject matter jurisdiction. *Patrickson* expressly points to such affirmative use of Act of State principles. 251 F.3d at 800 n.2. As is evident from *Patrickson* and from the decision below in this case, however, it would become entirely circular for the Act of State doctrine to have the same meaning in the jurisdiction-establishing and the jurisdiction-defeating contexts. In that event, subject matter jurisdiction would exist under the Act of State doctrine only in cases subject to dismissal under the Act of State doctrine. The operative rule, therefore, cannot require the party asserting jurisdiction to show – as a predicate for subject matter jurisdiction – that adjudication of the claims requires a federal court to sit in judgment of the acts of a foreign sovereign within its own territory.

Nor does it help nominally to invoke another doctrine – such as the federal common law of foreign relations – and then to make that doctrine co-extensive with the Act of State doctrine. In the view of the Ninth Circuit, subject matter jurisdiction exists only where "a court must decide – that is, when the outcome of the case turns upon – the effect of official action by a foreign sovereign." Pet. App. 12a (quoting *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp.*, 493 U.S. 400, 406 (1990)). By applying a doctrine – Act of State – normally used to defeat jurisdiction, the Ninth Circuit makes the analysis altogether circular.

This case provides a suitable opportunity for this Court to resolve the existing confusion by

employing more discerning terminology and analysis. In the present circumstances, the federal common law of foreign relations offers a more direct, more accurate, and more understandable mode of analysis that plainly applies to this case. A case such as this one – in which a foreign provincial government challenges actions by an entity in which officials and agencies of that country's national government owned the largest share – surely poses questions of foreign relations. Moreover, the actions challenged in the complaint were authorized, approved, and acquiesced in by multiple Philippine administrations over the course of decades. *See* note 2, *supra*. Furthermore, the only defendants in the case are Canadian companies (one of which held an indirect minority interest at one time in the Philippine company that is alleged to be the tortfeasor). In light of these facts, it is clear that the foreign relations issues implicate not only United States-Philippine relations, but United States-Canadian relations as well.

On this record, there should be no doubt that a federal court has subject matter jurisdiction to consider these questions. Even if a district court ultimately determines that dismissal is warranted under the Act of State doctrine or *forum non conveniens*, there is no basis for denying that court the threshold jurisdiction to make those rulings.

In short, there are vitally important reasons for this Court to grant certiorari, to resolve the existing conflict among the circuits, and to dissipate the confusion that has befuddled lower courts in analyzing jurisdiction under the federal common law

of foreign relations. This case is an ideal vehicle for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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March 29, 2010

(4)

No. 09-944

In the Supreme Court of the United States

PLACER DOME, INC., ET AL., PETITIONERS

v.

PROVINCIAL GOVERNMENT OF MARINDUQUE, REPUBLIC OF THE PHILIPPINES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

This suit concerns allegations that private companies violated Philippine law by engaging in mining activities that caused severe environmental damage in Marinduque, an island province of the Philippines.

The questions presented are:

1. Whether the court of appeals could, consistent with *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 549 U.S. 422 (2007), review the district court's determination that the district court had subject-matter jurisdiction, where the district court went on to dismiss the case on forum non conveniens grounds.

2. Whether the district court had federal-question jurisdiction over this suit, even though respondent's claims are based entirely on Philippine law and do not raise any federal-law issues on the face of the complaint, by virtue of the complaint's allegations that the Philippine government failed to prevent the pollution at issue and had an ownership interest in one of the private companies allegedly responsible for the pollution.

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In the Supreme Court of the United States

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PROVINCIAL GOVERNMENT OF MARINDUQUE, REPUBLIC OF THE PHILIPPINES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

This suit concerns allegations that private companies violated Philippine law by engaging in mining activities that caused severe environmental damage in Marinduque, an island province of the Philippines. Pet. App. 3a.

1. Respondent, the Provincial Government of Marinduque, brought this suit in 2005 against petitioner Placer Dome, Inc. (Placer Dome), a Canadian corporation, in

Nevada state court.[1] Pet. App. 3a, 23a. Respondent, suing "in both its sovereign capacity and in its capacity as *parens patriae* to all Marinduquenos," *id.* at 117a, alleges that between 1964 and 1997, Placer Dome operated copper mines in Marinduque, and that those operations caused severe pollution and other environmental damage to Marinduque's land and waters. *Id.* at 22a-25a. As a result, respondent alleges, Marinduque's fishing and tourist industries have been gravely harmed, and its residents suffer from significant health problems, including respiratory ailments and heavy metal toxicity. *Id.* at 165a-170a. Respondent alleges that Placer Dome's actions violated Philippine law, and it asserts causes of action for violations of various Philippine environmental, mining and penal statutes, as well as under the Philippine doctrines of interference with the public trust, negligence, nuisance, breach of contract, and promissory estoppel. *Id.* at 170a-200a. Respondent seeks an injunction requiring petitioners to remediate the environmental damage that resulted from the mining, to establish environmental and medical monitoring funds, and to pay compensatory and punitive damages. *Id.* at 201a-202a.

According to the complaint, Placer Dome conducted its mining activities with little effective oversight by the then-existing Philippine government. In the 1960s, Placer Dome allegedly gave then-President Ferdinand Marcos a personal 49% ownership interest in a Placer

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[1] Petitioner Barrick Gold Corporation, also a Canadian corporation, was added as a defendant in 2006, after it obtained a controlling interest in Placer Dome. Pet. App. 4a n.2. Respondent alleged that the Nevada court had personal jurisdiction over Placer Dome because it conducts significant mining operations, unrelated to the operations at issue in this suit, in Nevada. *Id.* at 117a-119a.

Dome subsidiary called Marcopper Mining Corporation. Pet. App. 122a. Allegedly in exchange for that interest, Marcos overturned the protected status of a forest reserve under which Placer Dome wished to mine. *Ibid.* Despite Marcos' holdings in Marcopper, he allegedly did not play a management role. *Id.* at 123a. Rather, the subsidiary was controlled entirely by Placer Dome, *ibid.*, and Marcos functioned as "Placer Dome's secret partner," *id.* at 151a. Over the next two decades, Marcos allegedly "was more than willing to use his dictatorial powers to protect Placer Dome's mining operations, and his own significant stake in those operations." *Ibid.* For example, the complaint alleges that in 1974 Placer Dome requested and received Marcos' assistance in obtaining a permit to dump mine tailings into Marinduque's Calancan Bay. *Id.* at 128a. Similarly, in 1981, Placer Dome successfully requested that Marcos intervene in efforts by the Philippine National Water and Air Pollution Control Commission to curtail Placer Dome's ability to continue its dumping practices. *Id.* at 152a-153a.

After Marcos was overthrown in 1986, the Presidential Commission on Good Government (Presidential Commission) seized his Marcopper shares. Pet. App. 122a. In 1988, Placer Dome allegedly sought and received assistance from then-President Aquino in overruling a cease-and-desist order by the Pollution Adjudication Board, the government agency responsible for adjudicating pollution cases, that would have required Placer Dome to discontinue dumping pollutants into Calancan Bay. *Id.* at 154a-155a. In 1997, respondent alleges, Placer Dome ceased mining operations and divested itself of its Marcopper holdings, leaving behind a wholly-owned subsidiary to address efforts by the

Philippine government and individuals to obtain remediation and compensation. *Id.* at 158a. That subsidiary pulled out of the Philippines in 2001. *Id.* at 159a-160a.

2. a. After respondent filed this suit in Nevada state court, Placer Dome removed the case to federal district court under 28 U.S.C. 1441(a). Placer Dome contended that the district court had subject-matter jurisdiction because the case presented a federal question under 28 U.S.C. 1331. Br. in Opp. App. 5b. Initially, respondent did not object to proceeding in federal district court, but it expressed concern that the court might not have subject-matter jurisdiction. Pet. App. 83a. Without taking a position on the existence of jurisdiction, respondent moved for an order requiring Placer Dome to show cause why the action should not be remanded to state court for lack of federal jurisdiction. Br. in Opp. App. 1b.

The district court concluded that it had subject-matter jurisdiction. Although the complaint asserted only violations of Philippine law, the court held that jurisdiction could be premised on federal common law, and in particular, the act of state doctrine. Br. in Opp. App. 5b-6b. That doctrine, the court explained, "precludes U.S. Courts from questioning the validity of actions that a foreign government takes within its own borders." *Id.* at 6b (citing *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 426 (1964)). The court reasoned that it would have federal-question jurisdiction if "the allegations in Plaintiff's Complaint require the Court to evaluate any act of state or apply any principle of international law before it can assert jurisdiction." *Id.* at 7b. Examining respondent's complaint, the court concluded that the complaint was "replete with allegations regarding the Philippine Government's activities, which contributed

to the environmental harm that Plaintiff has suffered." *Id.* at 8b. Accordingly, the court held that it had subject-matter jurisdiction because "the allegations in Plaintiff's Complaint require this Court to evaluate the acts of a foreign state." *Ibid.*

b. After the district court declined to dismiss the case on subject-matter jurisdiction grounds, petitioners sought dismissal on two other threshold grounds, personal jurisdiction and forum non conveniens. Pet. App. 104a-105a. Uncertain whether it was authorized to dismiss on forum non conveniens grounds without first establishing that it had personal jurisdiction over petitioners, the district court authorized limited discovery related to personal jurisdiction. *Id.* at 110a-111a.

While the parties were conducting that discovery, this Court issued its decision in *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007) (*Sinochem*), holding that "a district court has discretion to respond at once to a defendant's *forum non conveniens* plea, and need not take up first any other threshold objection." Exercising the discretion upheld in *Sinochem*, the district court stayed discovery on the existence of personal jurisdiction, explaining that the personal jurisdiction questions were complex and required burdensome discovery, while the forum non conveniens question could be addressed with "relative ease." Pet. App. 26a, 28a.

Turning to petitioners' motion to dismiss on forum non conveniens grounds, the court held that the action "has been filed in an inconvenient and thus inappropriate forum." Pet. App. 29a. Respondent's claims arose under Philippine law, the court reasoned, and concerned events that occurred in the Philippines. *Id.* at 30a-36a. Petitioners proposed British Columbia, Canada, as an

adequate alternative forum. Largely because petitioners were incorporated there and had agreed to accept service there, the district court concluded that British Columbia would be a preferable forum. *Id.* at 36a-60a. It therefore dismissed the case.

In the course of its decision on the forum non conveniens issue, the district court stated in passing that the case presented "a complex question of subject matter jurisdiction" that the court could avoid by addressing forum non conveniens first. Pet. App. 28a. On respondent's motion for reconsideration, however, the district court explained that in making that statement, it had overlooked its previous determination that it had subject-matter jurisdiction. *Id.* at 63a. After "having been apprised by [respondent] of the error," the court reaffirmed that it "concludes now, as it did before, that subject matter jurisdiction does, in fact, exist in this case, based upon the act of state doctrine." *Id.* at 63a-64a.

3. The court of appeals reversed the district court's ruling that it had subject-matter jurisdiction, vacated the forum non conveniens ruling, and remanded with instructions to remand the case to state court. Pet. App. 1a-21a.

The court of appeals first rejected petitioners' contention that the district court had "dismissed this case on *forum non conveniens* grounds without resolving the issue of subject-matter jurisdiction," and that the district court's asserted sequencing precluded the court of appeals from addressing subject-matter jurisdiction. Pet. App. 7a. The court of appeals stated that under *Sinochem*, it had the authority to determine for itself "whether the jurisdictional issue should be addressed, regardless of the path the district court chose to take."

Id. at 8a. In any event, the court determined, petitioners "misapprehend[ed] the proceedings below," *ibid.*, because "the district court made a threshold determination that it had federal-question jurisdiction under the act of state doctrine," *id.* at 10a. The court therefore concluded that "*Sinochem* presents no bar to our reaching the issue of whether [respondent's] allegations invoke federal questions."[2] *Ibid.*

Turning to subject-matter jurisdiction, the court of appeals observed that the issue was "not particularly complex." Pet. App. 10a. The court explained that in *Patrickson* v. *Dole Food Co.*, 251 F.3d 795, 803 (9th Cir. 2001), aff'd in part on other grounds, cert. dismissed in part, 538 U.S. 468 (2003), it had rejected an approach, followed by certain other courts of appeals, that permitted "federal-question jurisdiction over any case that might affect foreign relations regardless of whether federal law is raised in the complaint." Pet. App. 13a. Turning to petitioners' contention that federal jurisdiction could be premised on the act of state doctrine (see Pet. C.A. Br. 53-60) the court of appeals stated that the act of state doctrine would have to be an essential element of respondent's claims in order to support federal-question jurisdiction. *Id.* at 16a. Although the complaint identified several actions taken by former President Marcos and his successor, the court concluded that "none of the supposed acts of state * * * is essential to the Province's claims." *Id.* at 17a. The court explained that determining liability would not require the court to

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[2] The court also observed that in the context of a case removed from state court, the decision as to which threshold issue to address first may have practical consequences: a forum non conveniens ruling leads to dismissal, and a holding that the court lacks subject-matter jurisdiction results in remand to state court. Pet. App. 9a-10a.

pass on the validity of any government action; rather, respondent would prevail by establishing that Placer Dome's conduct violated Philippine law. *Id.* at 18a. Thus, the act of state doctrine would enter the case only as a defense—for instance, if petitioners argued that Placer Dome's actions were insulated from liability because they were taken pursuant to governmental permits, *id.* at 15a. An anticipated federal defense, the court reiterated, is not sufficient to give rise to federal-question jurisdiction. *Id.* at 13a (discussing well-pleaded complaint rule); see, *e.g.*, *Rivet* v. *Regions Bank*, 522 U.S. 470, 475 (1998).

Confirming its conclusion, the court of appeals stated that "some of the key considerations motivating the act of state doctrine carry little weight here." Pet. App. 19a. The court noted that criticism of the actions of former Philippine regimes raised less significant foreign-relations implications than "reviewing the current government's actions." *Id.* at 20a. In particular, the court saw little chance that consideration of Marcos's allegedly corrupt actions would influence current foreign relations, particularly because the current Philippine government had "openly condemned" Marcos's conduct. *Id.* at 19a-20a.

4. On March 12, 2010, in accordance with the court of appeals' instructions, the district court remanded this case to state court. See *Provincial Gov't of Marinduque* v. *Placer Dome, Inc.*, No. 05-cv-1299, Docket entry No. 251 (D. Nev.).

DISCUSSION

Petitioners challenge the court of appeals' decision to review the district court's ruling on subject-matter jurisdiction without first addressing the district court's ruling on forum non conveniens, as well as the court of appeals' holding that the district court lacked subject-matter jurisdiction. Neither question presented warrants this Court's review.

The court of appeals' decision to review the district court's subject-matter jurisdiction ruling before its forum non conveniens ruling is a straightforward application of *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 436 (2007) (*Sinochem*). *Sinochem* reaffirmed that a court should ordinarily address jurisdictional issues first among threshold questions, absent countervailing judicial-economy concerns. The court's holding does not conflict with that of any other court of appeals or any of this Court's precedents.

There is also no reason for this Court to review the court of appeals' determination that it lacked subject-matter jurisdiction. The court of appeals correctly held that the allegations in respondent's complaint do not turn on the act of state doctrine. Petitioners do not contend otherwise. Rather, petitioners assert that federal-question jurisdiction exists under the federal common law of foreign relations whenever a complaint "substantially affects a foreign country's sovereign interests, even if the elements of the causes of action on their face do not require adjudication of a foreign sovereign's actions." Pet. 22. Petitioners further contend that the courts of appeals are divided on that question. *Ibid.* But this case presents no occasion for this Court to resolve that question, because federal-question jurisdiction would be lacking even under the standard that peti-

tioners advocate. Respondent's claims, as framed in the complaint, do not implicate any foreign-policy concerns or any vital sovereign or economic interests of the Philippines, and the United States is aware of no concern on the part of the Philippine government regarding the adjudication of this case in United States courts.

1. The Court Of Appeals' Decision To Address The District Court's Subject-Matter Jurisdiction Is Consistent With This Court's Precedents And Does Not Merit Review

Petitioners contend (Pet. 11-14) that this Court should grant a writ of certiorari because the court of appeals' decision to review the district court's subject-matter jurisdiction ruling before its forum non conveniens ruling was inconsistent with *Sinochem*, 549 U.S. at 436. Petitioners are incorrect, and further review is not warranted.

A. In *Sinochem*, this Court held that although a district court ordinarily should address jurisdictional questions first among threshold issues, the court has discretion to "dispose of an action by a *forum non conveniens* dismissal, bypassing questions of subject-matter and personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant." 549 U.S. at 432; see *id.* at 435. In *Sinochem*, the district court had chosen to dismiss the case on forum non conveniens grounds before it determined whether it would have had personal jurisdiction, because it had found that the personal jurisdiction question could not be resolved without discovery. *Id.* at 427. The court of appeals vacated that ruling and instructed the district court to determine the existence of personal jurisdiction before proceeding to the forum non conveniens inquiry. *Id.* at 428. This Court reversed, holding that because

forum non conveniens is a threshold inquiry that does not involve adjudication of the merits, a court may bypass difficult jurisdictional questions in order to dismiss on forum non conveniens grounds when doing so would be the "less burdensome course." *Id.* at 436; see *id.* at 432; see also *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 587-588 (1999).

Sinochem thus gave district courts a measure of discretion to depart from the general rule that a court must determine the existence of jurisdiction before proceeding further. In this case, however, the district court did not exercise that discretion to bypass the question of subject-matter jurisdiction. Rather, it addressed the existence of subject-matter jurisdiction—and concluded that it had jurisdiction—before going on to dismiss the suit on forum non conveniens grounds. Pet. App. 64a.[3] The court of appeals was therefore not presented with any *Sinochem* sequencing decision to review, and petitioners' contention (Pet. 14) that the court of appeals "ignored the issue sequencing chosen by the district court" is misplaced.

Rather, the court of appeals was presented with two threshold rulings by the district court, on subject-matter jurisdiction and forum non conveniens. The court of appeals chose to review the jurisdictional ruling first, and found it to be dispositive. Nothing in *Sinochem* suggests that the court of appeals, presented with the district court's two rulings on distinct threshold issues, was required to bypass what it reasonably viewed as a straightforward jurisdictional question, Pet. App. 10a, to

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[3] Although the district court inadvertently cast doubt on its previous jurisdictional ruling in its forum non conveniens opinion, see Pet. App. 28a, the court subsequently reaffirmed that it had held that it had subject-matter jurisdiction over the suit, *id.* at 63a-64a.

address forum non conveniens. To the contrary, *Sinochem* explicitly preserved the longstanding rule that whenever "a court can readily determine that it lacks jurisdiction * * * the proper course would be to dismiss on that ground." 549 U.S. at 436. The decision in *Sinochem* simply created an exception to the general rule when judicial economy favors resolving forum non conveniens first. The court of appeals permissibly found that this case fell within the rule and not the exception. Second-guessing that conclusion would not serve *Sinochem*'s goal of promoting judicial economy and sparing the parties the burden of extended procedural litigation.[4] See *id.* at 435.

B. Petitioner also questions (Pet. 13) the relevance of the court of appeals' observation that unlike a forum non conveniens dismissal, a determination that removal was improper for lack of jurisdiction results in a remand to state court. See Pet. App. 10a. It is not clear that that passing observation had any effect at all on the court of appeals' decision to address subject-matter jurisdiction before forum non conveniens. The court of appeals primarily emphasized the fact that the district court had "made a threshold determination that it had federal-question jurisdiction" and that the jurisdictional question was "not particularly complex." *Ibid.*; see *id.*

[4] There is also no merit to petitioners' apparent suggestion (Reply Br. 7) that, even after rejecting the district court's jurisdictional analysis, the court of appeals should have hypothesized that there might have been another basis for subject-matter jurisdiction that the district court never considered, and therefore reviewed the district court's forum non conveniens analysis. The court of appeals properly ordered that the case be remanded to state court after rejecting the only theory petitioners advanced in support of subject-matter jurisdiction. See Pet. C.A. Br. 53-60 (arguing that "The District Court Had Subject Matter Jurisdiction Under The Act Of State Doctrine").

at 8a. Those considerations are, as discussed above, completely consistent with *Sinochem*. In any event, even if the court of appeals believed that the differing consequences of adjudicating jurisdiction and forum non conveniens militated in favor of addressing jurisdiction first, nothing in *Sinochem* casts doubt on that analysis. This Court recognized in *Ruhrgas*, 526 U.S. at 586-587, that in a removed case, a court may properly consider the consequences that might flow from its issue-sequencing decision, as well as any resulting comity and judicial economy concerns, in exercising its discretion as to which threshold issue to address first.

II. The Court Of Appeals' Conclusion That It Lacked Subject-Matter Jurisdiction Over This Suit Is Correct And Does Not Merit This Court's Review

The court of appeals correctly rejected petitioners' contention that respondent's claims for alleged violations of Philippine law give rise to federal-question jurisdiction because they implicate the validity of a foreign sovereign's act of state. Although petitioner contends that the court's decision reinforces a conflict among the courts of appeals as to whether federal-question jurisdiction exists over claims that more generally implicate a foreign sovereign's "vital economic or sovereign interests," this case presents no occasion to consider that question. Respondent's claims do not implicate any such sovereign interests, and therefore there would be no federal jurisdiction over this suit even under the standard that petitioner proposes.

A. The court of appeals correctly held that it did not have "federal question jurisdiction under the act of state doctrine." Pet. App. 10a. Petitioners' removal of this case to federal court was proper only if the suit could

have been brought in the district court in the first instance. 28 U.S.C. 1441(a). And the answer to that question would turn on the existence of federal-question jurisdiction, which lies over any claim "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. 1331. As the parties asserting federal jurisdiction, petitioners had the burden of demonstrating jurisdiction. *See DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 342 (2006). Before the court of appeals, petitioners acknowledged that the complaint does not assert that respondent is entitled to relief by virtue of any federal right or cause of action, Pet. C.A. Br. 6, but argued that federal-question jurisdiction could be premised on the fact that respondent's complaint "implicates the act of state doctrine." *Id.* at 55.

The act of state doctrine is a "rule of decision" that holds that a court may not adjudicate the validity of a foreign sovereign's public acts within its territory. *W.S. Kirkpatrick & Co.* v. *Environmental Tectonics Corp. Int'l*, 493 U.S. 400, 405 (1990) (*Kirkpatrick*). As the court of appeals noted, "[a]ct of state issues only arise when a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign." Pet. App. 12a (quoting *Kirkpatrick*, 493 U.S. at 406). The doctrine is based in federal common law, *see Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 426 (1964), and thus could give rise, petitioners asserted, to federal-question jurisdiction. *See Patrickson* v. *Dole Food Co.*, 251 F.3d 795, 800-804 (9th Cir. 2001) (noting that a plaintiff's claim may invoke the act of state doctrine if prevailing turns on the court's recognizing the validity of a sovereign act), aff'd in part on other grounds, cert. dismissed in part, 538 U.S. 468 (2003).

The court of appeals correctly concluded that respondent's complaint does not turn on application of the act of state doctrine. To be sure, the complaint portrays Placer Dome's alleged wrongdoing as having been tolerated and at times facilitated by the then-existing Philippine government: it alleges, among other things, that former Philippine President Marcos owned a significant interest in Placer Dome's Philippine subsidiary and that Marcos acted to obstruct government regulation of Placer Dome's mining and dumping activities. See, *e.g.*, Pet. App. 122a, 126a-128a, 151a, 155a. But as the complaint is framed, the Philippine government's actions or omissions are tangential to respondent's claims. Respondent has not sued any Philippine government official or entity, and its success on its claims turns on demonstrating that Placer Dome's and its subsidiaries' conduct violated Philippine law and that petitioners may be held liable for those violations. See *id.* at 18a ("For example, proving that Placer Dome was reckless when it hastily built the Maguila-Guila dam, which allegedly collapsed only two years after being built, does not implicate, let alone require, any act of state."). In sum, as the Ninth Circuit observed, "the parties' dispute as framed by the complaint does not require us to pass on the validity of the Philippines' governmental actions." *Id.* at 20a.

The act of state doctrine would come into the case, if at all, only as a defense: petitioners, for example, might contend that the actions of Placer Dome and Marcopper were lawful because they were approved by the Philippine government through the issuance of permits or otherwise, and might invoke the act-of-state doctrine to assert that the district court must take the government's actions as valid. See Pet. App. 15a (act of state doctrine

"is implicated here only defensively"). But this Court has "long held that the presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Rivet* v. *Regions Bank*, 522 U.S. 470, 475 (1998) (internal quotation marks and brackets omitted). "A defense is not part of a plaintiff's properly pleaded statement of his or her claim," and thus "a case may not be removed to federal court on the basis of a federal defense." *Ibid.* (internal quotation marks omitted). The court of appeals therefore correctly held that an anticipated act of state defense may not form the basis for federal-question jurisdiction and cannot support removal to federal court. Petitioners do not appear to challenge that ruling.

B. Before this Court, petitioners instead contend more broadly that federal-question jurisdiction exists whenever an action has "important foreign policy implications even though not raised as an essential element of a cause of action," and that the courts of appeals are divided on the issue. Pet. 15. Petitioners did not rely upon this broader theory of federal jurisdiction in the courts below, and therefore did not present those courts with any factual submissions or legal argument that might be necessary to assess the application of that theory. Nor would the issue otherwise warrant review in the circumstances of this case.

As petitioner observes, the Fifth Circuit has held that claims that implicate vital economic or sovereign interests of a foreign government may give rise to federal-question jurisdiction even though the complaint does not raise or turn on any issue of federal or interna-

tional law. *See Torres* v. *Southern Peru Copper Corp.*, 113 F.3d 540, 543 (5th Cir. 1997); see also *Pacheco de Perez* v. *AT&T Co.*, 139 F.3d 1368 (11th Cir. 1998) (taking note of the Fifth Circuit's approach in *Torres*, but concluding that the claims at issue would not satisfy the *Torres* standard). The Second Circuit also has suggested that the "implications of * * * an action for United States foreign relations" could give rise to federal jurisdiction, but that conclusion was not necessary to the court's holding, as "in any event" the claims at issue "raise[d], as a necessary element, the question whether to honor" a foreign government's request that the court enforce a foreign directive to freeze assets. *Republic of the Phil.* v. *Marcos*, 806 F.2d 344, 354 (2d Cir. 1986), cert. dismissed, 480 U.S. 942 (1987), and cert. denied, 481 U.S. 1048 (1987); Pet. App. 16a (noting that in *Marcos*, application of the act of state doctrine was a necessary element of the claim). The Ninth Circuit, by contrast, has rejected the *Torres* approach, see *Patrickson*, 251 F.3d at 800-804, holding that foreign-policy implications are insufficient to give rise to federal jurisdiction when no issue of federal law appears on the face of the complaint.

Ordinarily, of course, federal question jurisdiction requires that a federal question be a substantial and necessary element of the plaintiff's claims, see *Grable & Sons Metal Prods., Inc.* v. *Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005), and an anticipated federal defense "normally does not create statutory 'arising under' jurisdiction." *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 207 (2004); cf. *id.* at 207-208 (reiterating well-pleaded complaint rule, but describing complete preemption under ERISA as an "exception" to that rule). But in any event, this case does not present an occasion to consider

whether there might be some limited circumstances in which important foreign-relations issues, though not elements of the claims, might be so intertwined with the claims or so directly or pervasively implicated as to provide a basis for federal jurisdiction. Respondent's complaint does not raise any significant foreign-relations issues or implicate vital sovereignty or economic interests of the Philippine government. The allegations therefore would not support federal-question jurisdiction even under the standard that petitioners advocate.

Respondent's complaint links Placer Dome's conduct to the Philippine government in two principal ways: first, it alleges that former President Marcos held an ownership interest, later seized by the Presidential Commission, in his personal capacity in a Placer Dome subsidiary; and second, it alleges that Marcos and former President Aquino aided Placer Dome in avoiding more stringent regulation, thereby contributing to Placer Dome's ability to engage in the conduct that allegedly damaged the environment. Neither of those connections suggests that "the government * * * directly participated in the allegedly tortious actions" or that "the lawsuit threaten[s] [the foreign country's] economic vitality" or sovereign interests. Pet. 17 (citing *Pacheco de Perez*, 139 F.3d at 1378). If allegations of official assistance to, or an official stake in, a private entity were sufficient in themselves to give rise to federal jurisdiction in a suit against that entity, the limits of federal-question jurisdiction would be significantly eroded.

With respect to Marcos's personal ownership interest in a Placer Dome subsidiary, the complaint does not suggest that that interest ever evolved into an active role for Marcos or the Philippine government in Placer

Dome's mining operations. According to the complaint, a "secret deal" between Marcos and Placer Dome "gave Marcos a personal ownership interest in a new Placer Dome subsidiary," Marcopper. Pet. App. 122a. Marcos allegedly held his shares "secretly," however, indicating that his ownership never evolved into any official government ownership interest during Marcos's tenure. *Ibid.* The complaint also makes clear that Marcos—and, after his shares were seized, the Philippine government—did not actively manage Marcopper: respondent alleges that Placer Dome "completely dominated" the subsidiary for the entire time period at issue, and that the subsidiary "did not act independently of Placer Dome." *Id.* at 123a. In short, the Philippine government is not alleged to have had a management role in any of the activities at issue in this case.

Nor do the ownership allegations suggest that the suit would "threaten[] [the Philippines'] economic vitality." Pet. 17. According to the complaint, petitioners no longer have any holdings or operations in the Philippines, Pet. App. 157a–160a, and the subsidiary in which Marcos and the Presidential Commission had an ownership interest is not a defendant here. Petitioners have suggested no basis on which to conclude that a lawsuit in United States courts seeking damages and injunctive relief from petitioners for Placer Dome's private conduct could significantly threaten the Philippine government's economic interests.

With respect to the Philippine government's actions as a regulator, the complaint alleges only that President Marcos and, later, President Aquino permitted Placer Dome to engage in mining and acceded to Placer Dome's requests to prevent regulation of the dumping at issue in this case. See Pet. 23-24. As discussed above, respon-

dent's claims, as framed in the complaint, do not seek to have the trial court determine the validity of those actions. See Pet. App. 170a-200a; *id.* at 17a-18a. But even if adjudicating the claims might entail impugning some or all of the governmental acts alleged, the majority of those actions or omissions occurred during Marcos' regime, which ended over two decades ago with his overthrow in 1986. See *id.* at 122a, 126a-128a, 151a, 154a-155a, 157a. The Philippine government has distanced itself from that regime, "openly condemn[ing] the conduct of its past president." *Id.* at 20a. In these circumstances, petitioners have not proffered any reason to conclude that the court's potential consideration of those actions would implicate the Philippines' "vital * * * sovereign interests," as would be necessary even under the standard petitioners advocate. Pet. 15.

In these circumstances, it is unsurprising that the Philippine federal government has not expressed any concerns—either to the United States or to the courts—about the potential for this case to impugn the actions of its former officials, or to have an adverse impact on the Philippines' sovereign or economic interests. Nor has Canada, whose only apparent connection to the case is that petitioners are domiciled there, expressed any interest in the case. The United States therefore has no reason to conclude that any government has a high level of concern about the adjudication of this suit in United States courts, or that this case might significantly impact the United States' relations with any other country.

For the foregoing reasons, the circumstances presented in this case differ significantly from those presented in *Torres* and *Marcos*, both of which concerned allegations that substantially and directly implicated significant sovereign interests. In *Torres*, a tort suit

against numerous mining companies for environmental damage caused by mining in Peru, the Peruvian government owned a refinery whose polluting activity was at issue, and Peru's mining industry—of which the one of the defendants was "the largest company"—was "critical to that country's economy." 113 F.3d at 543. Accordingly, Peru informed both the Department of State and the court that "the litigation implicates some of its most vital interests and, hence, will affect its relations with the United States." *Id.* at 542. Similarly, in *Marcos*, the suit was "brought by a foreign government against its former head of state to regain proper[t]y allegedly obtained as the result of acts while he was head of state," and the complaint directly presented "the question whether to honor the request of a foreign government that the American courts enforce the foreign government's directives to freeze property in the United States." 806 F.2d at 354. Given the important sovereign and economic interests implicated by those suits and the comparative lack of any such concerns in this case, it is clear that even under the *Torres* standard, petitioners would be unable to establish federal-question jurisdiction.[5] Further review is not warranted.

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[5] Petitioners also suggest in passing (Pet. 24) that respondent's "assertion of *parens patriae* standing" presents a federal question. That issue is not fairly included in the question presented, see Sup. Ct. R. 14.1(a), and it was not pressed or passed on below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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